

GLOBALIZATION, REVISING THE TERMS OF TRADE, AND THE RETURN OF ‘HISTORY’

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I. INTRODUCTION

For decades, American political leaders, commentators, and scholars have complained about unfair trading practices in the global economy and talked about the need to address the United States’ chronic trade deficits. That narrative has included a political *kabuki* in which candidates for federal offices make loud promises to “level the playing field” in international trade—and then, once in office, quickly change their tune or find other issues to fill their dance card. Being keen observers of American politics, both foreign governments and multinational corporations caught on—and have come to expect that the political growl from Washington on these issues would rarely, if ever, be followed by a bite.¹

The Trump Administration changed that narrative. Counter to what practically any tactician would have advised, in 2017 the Trump team simultaneously initiated trade disputes with practically all of America’s major trading partners. The disputes were so loud and blunt that, for a time, it seemed that President Trump was intent on dismantling the global trading system.²

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¹ See, e.g., Jane Perlez, *China Is Confronting New U.S. Hostility. But Is it Ready for the Fight?*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/world/asia/china-us-trade-war.html> (“Chinese scholars often observe that new American presidents usually take a hard line against China but seek cooperation after realizing how the two nations need each other. President Trump has stunned them by defying that pattern.”).

² See, e.g., Edward Luce, *How America’s Friends and Enemies have Adjusted to the Age of Trump*, FINANCIAL TIMES (June 22, 2017), <https://www.ft.com/content/9bbf6c80-56d2-11e7-80b6-9bfa4c1f83d2>. The Chinese government certainly sought to portray Trump’s efforts this way. See Editorial, *World*

The response of the policy establishment to these early Trump moves was a sort of *panic at the disco*. There was (a) a strong reaction against Trump's efforts to achieve improved trade deals coupled with (b) a relentless, often simplistic defense of the post-1947 liberalized trading system. That defense is largely justified, but it has been disheartening to see a general refusal among establishment voices to engage the deep questions Trump's actions should provoke—questions about the benefits and costs of globalization, questions on whether and how the United States might be able to improve meaningfully its terms of trade with the rest of the global economy.

By mid-2019, the Trump administration had successfully revised America's trade deal with South Korea, negotiated a new NAFTA,³ and held to a trade truce with the European Union.⁴ All this made the outlook for the global trading system seem considerably less apocalyptic. Although there were occasional blow-ups on other fronts, the White House's 2019 efforts seemed focused specifically on America's trade relationship with China.

What does all the 2017-2019 turmoil in international trade mean for the business community? Part II below looks at how both leading news organizations and scholarly commentators sought—often with simplistic and/or misleading rhetoric—to defend international trade and to critique the Trump Administration's argument that the United States should deemphasize geopolitics in order to get a better deal from the global trading regime. We will never know whether President Trump could have achieved a genuine re-evaluation of the trade regime on these terms, precisely because the debate has now focused on the China-U.S.

Must Resist US Wrecking Trade System, CHINA DAILY (June 18, 2018), <http://www.chinadaily.com.cn/a/201806/18/WS5b27b742a310010f8f59d70a.html>; Dan Steinbock, *Tariffs Undoing America's Future*, CHINA DAILY (June 21, 2018), <http://www.chinadaily.com.cn/a/201806/21/WS5b2ad9e2a3103349141dd642.html>; Andrew Moody, *Keeping Order*, CHINA DAILY (Sept. 25, 2018), <http://en.ccg.org.cn/html/top-issues/2534.html>; Steven Lee Myers, *Why China Is Confident It Can Beat Trump in a Trade War*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/world/asia/china-trade-war-trump-tariffs.html> ("The state media has depicted [Trump] as a reckless bully intent on undermining the global trading system.").

³ Jim Tankersley, *Trump Just Ripped Up NAFTA. Here's What's in the New Deal*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/business/trump-nafta-usmca-differences.html>.

⁴ Valentina Pop, Vivian Salama & Bob Davis, *U.S., Europe Call a Truce on Trade*, WALL ST. J., July 26, 2018, at A1.

relationship. Part III then explores the trade dispute between the Trump Administration and China, first as an economic dispute and then as part of a larger geo-political struggle. In this arena, the Trump Administration has succeeded in changing the terms of the debate: there is now less effort by establishment voices to discuss trade with China as purely about business and greater acceptance that trade will occur—as it always has—in the midst of a geo-political and ideological competition. Whereas the Trump team initially wanted to put geopolitics aside to force better trade deals, it is precisely awareness of the geopolitics that is forcing reassessment and long-term changes in the China-U.S. economic relationship.

II. THE ESTABLISHMENT PANICS OVER *PAX AMERICANA*

One indication of how much Donald Trump's election seemed to threaten the international order was the return of the phrase *Pax Americana*.⁵ The post-World War II "American Peace" has centered on economic strengthening and military defense of western democracies, development of strong international institutions, and a general thickening of international legal norms—on everything from child custody to chlorofluorocarbons. *Pax Americana* has always meant much more than peace: it has meant promotion of democratic institutions, free and fair elections, human rights, market economies, and connecting all those, the *rule of law*. *Pax Americana* has also meant, to some degree, the United States "remak[ing] the world in its own image";⁶ it has also been, in the

⁵ Usage of "Pax Americana" largely faded after the collapse of the Soviet Union, but under threat of the Trumpian moment, the phrase returned—to describe succinctly what is at risk. See, e.g., Carla Norrlof, *America-First Ideology will Trigger American Decline*, THE GLOBE AND MAIL (Nov. 14, 2016), <https://www.theglobeandmail.com/opinion/america-first-ideology-will-trigger-american-decline/article32837024/>; Ben Zimmer, *From Rome's Reign to 'Pax Americana'*, WALL ST. J., Dec. 10, 2016, at C4; Max Boot, *Pax Americana on Its Last Legs; The U.S. has been the Leading Champion of Free Trade and Democracy. Trump Wants None of It*, L.A. TIMES, Jan. 22, 2017, at 25; Roger Cohen, *Pax Americana is Over*, N.Y. TIMES, Dec. 17, 2016, at 21; Jacob Heilbrunn, *Will Pax Germania Replace Pax Americana?*, L.A. TIMES, Feb. 9, 2017, at 15; Luce, *supra* note 2 (noting that *Pax Americana* held "with a few ups and downs" even after the Soviet Union collapsed).

⁶ Luce, *supra* note 2.

words of one (admittedly American) Nobel laureate, “the most benign great-power domination in history.”⁷

Restoring international trade to its pre-1939 (and pre-1929) levels was always an integral part of *Pax Americana*. In the aftermath of WWII the United States consistently viewed economic development—including through trade—as a means to stabilize representative democratic governments. As the U.S. settled into a cold war with the Soviet Union, it was clear that increasing the economic wealth of Europe and Japan would make them better able to pay for their own defense (against communism) and, thereby, reduce America’s global burden. Economic wealth through free markets in Latin America, east Asia, and Africa would make the centralized economic model preached by the Soviet Union less appealing.

All this was also compatible with America’s own history. When the Founders met in Philadelphia in 1787, eliminating the power of the 13 states to levy tariffs on imports and exports among themselves was part of the agenda. As the historian John Truslow Adams wrote in his 1931 classic *The Epic of America*,

The forbidding of the States to levy any import or export duties was to make the United States within itself the greatest free-trade area in the world eventually, and greatly to increase the possibilities of national prosperity, the scale of American business, and to intensify national solidarity.⁸

When debating tariffs, the Founders focused on fairness between the states, the practicalities of raising revenues, and political realities.⁹ And the Constitutional Convention’s decision to forbid individual states from

⁷ Paul Krugman, *Pax Trumpiana*, N.Y. TIMES (July 26, 2016), <https://krugman.blogs.nytimes.com/2016/07/26/pax-trumpiana/>.

⁸ JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 109 (1931).

⁹ JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* REPORTED BY JAMES MADISON 466–69 (Adrienne Koch ed., Ohio Univ. Press 1966) (1840). This was a comment directed at New Jersey and Connecticut products being exported from New York, New Hampshire products being exported from Boston, and North Carolina tobacco leaving the country through Virginia. *See id.* at 498–501; *see also id.* at 412. Comments about economic integration were oblique at best. *See, e.g., id.* at 544. The question of imports and exports was also bound up, at least in the mind of delegates from southern states, with the issue of slavery. *Id.* at 409–10.

levying imports or exports “seemed a menacing encroachment”¹⁰ on state sovereignty at the time. While supporting the elimination of levies among the 13 states, James Madison believed that “regulation of imports” would likely be needed for “revenue, domestic manufactures, and procuring equitable regulations from other nations.”¹¹

Each of those issues—fairness, sovereignty, revenues, domestic manufacturing—has been a concern for the Trump team. Yet these historic concerns now seem to be lost or severely downplayed by both our press and commentators.

A. HOW THE PRESS PRESENTS TRUMP AND TRADE

As the Trump administration began to unveil policies in early 2017, it became clear that Trump’s anti-trade rhetoric in the 2016 campaign was more than campaign rhetoric. Demands for broad renegotiation of the terms of trade were leveled at Canada, China, South Korea, and Mexico; higher steel and aluminum tariffs were imposed or threatened to be imposed against all those countries as well as the European Union, Argentina, Australia, Brazil, and South Korea;¹² prohibitively high tariffs were threatened on automobiles from Canada, Mexico, and Europe;¹³ tariffs on billions of dollars of imports from China *were imposed*; and the United States withdrew from the Trans-Pacific Partnership, a trade deal it had reached with 11 countries.

President Trump’s moves on international trade provoked different reactions from the establishment, practically none positive. A *Financial*

¹⁰ ADAMS, *supra* note 8, at 109.

¹¹ MADISON, *supra* note 9, at 499–500.

¹² On March 8, 2018, President Trump signed an order to impose higher tariffs on all steel and aluminum imports effective after 15 days; the order included a temporary carve-out provision for the EU, Canada, Mexico, Australia, Argentina, Brazil and South Korea. The tariffs were later imposed on Canada, the EU, and Mexico at the end of May. See generally Heather Long, *Trump has Officially Put More Tariffs on U.S. Allies than on China*, WASH. POST, June 1, 2018, at A13; Jim Brunsten & Shawn Donnan, *US Grants Last-Minute Exemptions to Looming Steel Tariffs*, FIN. TIMES (Mar. 22, 2018), <https://www.ft.com/content/fac4f67a-2db7-11e8-a34a-7e7563b0b0f4>; John Fritze, *Canada, EU, Mexico Balk as Trump Imposes Tariffs on Steel, Aluminum*, USA TODAY, June 1, 2018, at 4B; Editorial, *Trump’s Steel Destruction*, WALL ST. J., June 1, 2018, at A14.

¹³ Pierre-Yves-Dugua, *Trump menace l’automobile européenne*, LE FIGARO, June 23, 2018, at 24 (describing European concerns about Trump’s threat of a 20% tariff on automobiles).

Times editorial gives a sense of these different strands—and of a global elite frothing at the mouth over Trump:

If one sat down and made a determined effort, it would be hard to come up with a more economically wrong-headed, diplomatically toxic, and legally destructive negotiating position than that presented to China last week by a visiting US trade delegation.¹⁴

First and perhaps foremost, there has been the *procedural* objection to Trump's style—his undiplomatic bluntness, inconsistency, and apparent lack of command of facts. Substantively, there has been at least three levels of complaints. First, there is the complaint that Trump does not understand geo-politics and how deeply corrosive his trade agenda is on the post-1947 multilateral trading system, America's network of alliances, and the post-WWII global order generally. This is the concern for *Pax Americana*. Second, there have been the substantive objections that President Trump simply does not understand the benefits of international trade (or basic macroeconomics). Third, there have been distinct clusters of criticisms based on country or region, i.e. how he has mishandled Canada and Mexico, China, or the EU.

Let us focus on the second line of criticism: that President Trump does not understand economics or the benefits of international trade. The press is certainly correct to report on how higher tariffs may increase prices for American consumers,¹⁵ how retaliatory tariffs might cut off markets or market expansion for U.S. concerns,¹⁶ and how foreign investment in the U.S. creates jobs.¹⁷ But there is also no mistaking the fact that our major news organizations have often responded to Trump's

¹⁴ Editorial, *Trump's Irrational Trade Demands on China*, FIN. TIMES (May 8, 2018), <https://www.ft.com/content/22f89cac-4fbc-11e8-a7a9-37318e776bab>.

¹⁵ See, e.g., Andrew Tangel, *Business News: Pricier TVs Seen as Tariffs Loom*, WALL ST. J., Apr. 26, 2018, at B3; Sarah Gardner, *Trump's Tariffs Will Increase Cost of Fixing Your Car*, L.A. TIMES, Aug. 19, 2018, at 2.

¹⁶ See, e.g., Michael Hiltzik, *State's Dairies Getting Creamed in Trade War*, L.A. TIMES (Oct. 28, 2018), https://enewspaper.latimes.com/infinity/article_share.aspx?guid=cd97247b-c6d4-4ac9-8a88-a33572a6e3b4; Ana Swanson, *Trump's Trade Policy is Lifting Exports of Canadian Lobsters*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/business/trump-trade-lobster-canada.html>.

¹⁷ See, e.g., Patricia Cohen, *When Foreign Companies Are Making, Not Killing, U.S. Jobs*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/business/economy/chattanooga-foreign-investment.html>.

agenda with their own simplistic message that trade is good and the Trump administration's efforts are misguided.

Sometimes, stories have simply misrepresented the economics in their haste to criticize the Trump agenda. Consider a 2017 *Los Angeles Times* story called, *Why Trump's obsession with trade deficits is misguided* which tried to lessen the significance of the trade deficit with Mexico this way: "[t]he trade gap with Mexico, for example, looks very big—\$63 billion last year. But the reality is that about 40% of the value of the goods imported from Mexico is made in the U.S."¹⁸ The journalist literally did not understand that the "40%" was already counted as U.S. exports and he was, in effect, trying to minimize the size of the deficit by counting U.S. exports twice.¹⁹

In 2017 and 2018, there was a range of hyperbolic stories and/or headlines in major newspapers, making little or no effort to explain the economic complexities of trade. *Need a Hip? It May Cost You More* was one *New York Times* headline with the subheading "the White House's tariff list targets many Chinese-made medical devices and drugs."²⁰ The actual story was a breezier "we just don't know" based on China having a 12% share of U.S. medical device imports.²¹ Many stories — or at least headlines — seem intent on casting the Trump trade agenda in a negative light. The header of one *New York Times* story read that a year after increased tariffs on washing machines "prices are up, sales have fallen and stock prices are down," but the actual article described Home Depot as saying that its washing machine sales are recovering and are "on par, if not slightly better, than the average of our overall appliance business."²² A *Los Angeles Times* story on the revised NAFTA deal has the headline *Trade deal would hurt autos, report finds* but the actual story reported that an International Trade Commission study predicted "1,500

¹⁸ Don Lee, *Why Trump's Obsession with Trade Deficits is Misguided*, L.A. TIMES, May 4, 2017, at 2.

¹⁹ Email correspondence between the author and Don Lee, June 17, 2017 (on file with the author).

²⁰ Sheila Kaplan and Katie Thomas, *Need a Hip? It May Cost You More*, N.Y. TIMES, Apr. 7, 2018, at B1.

²¹ *Id.*

²² Jim Tankersley, *Tariffs Tossed a Market Right into a Spin Cycle*, N.Y. TIMES, Jan. 26, 2018, at B1. And given that washing machines are capital goods, if a modest price increase substantially impacts sales, might not that suggest that people were replacing their washing machines too soon?

jobs lost in vehicle production” that “would be offset by a gain in almost 30,000 jobs in [auto] parts production.”²³

The preference for hyperbole over explanation was evident in another *Los Angeles Times* article, this one detailing a whole series of consumer goods prices that might increase, including the cost of dinner at home—everything from silverware to Chinese tilapia. The article added “[w]ashing it all down with apple juice or Chinese wine will cost an extra 10% too.”²⁴ Even mentioning Chinese wine seems bizarre: almost no one in the U.S. drinks Chinese wine (and if they are, they are not getting the benefits of global trade). On the other hand, it is true that the United States imports a lot of apple juice from China. China supplies roughly 2/3 of the apple juice *concentrate* imported into the U.S.,²⁵ while Canada supplies most of the not-from-concentrate apple juice by a factor of almost 8 to 1.²⁶ Argentina, Chile, Germany, Mexico, Poland, and Turkey are all significant apple producers with limited imports into the U.S. market²⁷ with Poland and Turkey substantially increasing their concentrate exports to the U.S. between 2016 and 2017.²⁸ So, would increased tariffs on Chinese apple juice cause an increase in prices? Or prevent or moderate price reductions that would otherwise occur from increased supplies? Or just shift suppliers to the U.S. market? Or shift consumption from concentrate to not-from-concentrate? Nothing so complex is mentioned, let alone explained, in the typical major newspaper story on international trade and the Trump Administration.

²³ Bloomberg, *Trade Deal Would Hurt Autos, Report Finds*, L.A. TIMES, Apr. 19, 2019, at C6.

²⁴ Bruce Einhorn and Angus Whitley, *Trump Trade was About to Hit Home*, L.A. TIMES, July 12, 2018 at C1.

²⁵ Tom Hurson, *Apple Juice Roundtable USA, Apple Crop Outlook & Marketing Conference*, USAPPLE ASS'N (2017), http://usapple.org/wp-content/uploads/2017/08/AppleJuicePanel_TomHurson.pdf.

²⁶ Caroline Calder, *USA – Fruit Juice Imports*, FRUIT JUICE FOCUS, (Nov. 16, 2017, <http://www.fruitjuicefocus.com/usa-fruit-juice-imports/>). In the most recent reporting period, one industry observer reports that Canada provided 8,143 tons of not-from-concentrate apple juice imports into the U.S. market while China provided 1,068 tons, noting that Canada sent “nearly eight times the amount shipped into the US from its nearest competitor China.” *Id.*

²⁷ *Id.*

²⁸ Hurson, *supra* note 25.

Occasionally, a more thoughtful approach appeared in the media, as when the *New York Times* ran a news analysis story that offered, in the second paragraph, the following:

The emerging trade war between the United States and China has prompted predictions of severe economic and geopolitical disruption. But for any given industry, the impact of tariffs depends on the microeconomics of its products: How much does demand change when prices rise? Are substitutes readily available? How much extra productive capacity is there around the world, and how long would it take to get new manufacturing facilities up and running?²⁹

The writers added: “[t]he lesson that emerged: be skeptical about predictions of radical disruption to major industries in the near term. For now, companies have options to avoid some of the most severe risks.”³⁰

It is hard to understand why our major news organizations have not been consistently this thoughtful. Indeed, barely a year later—and with the American economy growing at a fast clip despite increased tariffs—*The New York Times* was back to telling readers “huge swaths of the American economy depend on access to the Chinese market for materials, products and sales.”³¹

Perhaps since President Trump has a simple message on trade, the press in the United States (and the UK) have felt compelled to respond with their own simplified narrative, one in which more international trade is always good and higher tariffs are always bad. Three things are deemphasized in this narrative: discussions of how tariffs may benefit industrial production and employment, considerations of how free trade affects the *mix* of full-time jobs, and accounts of how our trading partners use subsidies and other policy tools more extensively than the United

²⁹ Neil Irwin, Alexandra Stevenson, & Claire Ballentine, *What a Trade War With China Looks Like on the Front Lines*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/23/upshot/what-a-trade-war-with-china-looks-like-on-the-front-lines.html>.

³⁰ *Id.*

³¹ Ana Swanson & Keith Bradsher, *Trump Threatens China with More Tariffs Ahead of Final Trade Talks*, N.Y. TIMES (May 5, 2019), <https://www.nytimes.com/2019/05/05/business/trump-tariffs-china-trade-talks.html>.

States does—precisely in order to promote (and protect) production and employment.

On the first of these, if higher tariffs are part of a successful economic sector, the tariffs will often be ignored. An example of this was a two-page August 2018 story in *The Economist* about “[h]ow the auto industry is coping with Donald Trump’s trade wars.” The article starts with the state of the most successful American model:

THE Ford F-150 pickup truck has been America’s bestselling vehicle for years. In Dearborn, a city near Detroit, a factory that once produced Henry Ford’s Model A now cranks out one of these all-aluminum tributes to testosterone every 53 seconds. The F-150 is so profitable—informed rumors suggest that each one adds nearly \$13,000 to Ford’s bottom line—that it is known around town as “the bank.”³²

The Economist article then discusses support in Michigan for Trump’s policies, how Trump steel tariffs are raising input costs for U.S. automakers, how very globalized the American automobile industry is, how “[s]ales, especially of trucks and SUVs, are still strong,” and that “[e]veryone is analyzing exposure, everyone is concerned.”³³

What is left unmentioned—from start (the F-150 pickup truck’s popularity and profitability) to finish (strong sales of trucks and SUVs)—is that trucks and SUVs are built in America behind a 25% tariff.³⁴ That tariff is ten times higher than the 2.5% tariff for passenger automobiles: it is very much the reason that truck and SUV production in the United States is robust, while passenger automobile production is a mixed story. Similarly, an April 2019 story in *The Wall Street Journal* about the “surge” in small SUV sales noted “[c]ar makers tend to make more money on sport-utility vehicles, mostly because they can command

³² *How America’s Car Industry is Coping with Trade Disputes*, THE ECONOMIST (Aug. 23, 2018), <https://www.economist.com/business/2018/08/23/how-americas-car-industry-is-coping-with-trade-disputes>.

³³ *Id.*

³⁴ Michael Hiltzik, *On Layoffs and Tariffs, GM and Trump Both are Flagrantly Dishonest*, L.A. TIMES (Nov. 30, 2018, 6:30 AM), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-gm-layoffs-20181130-story.html> (“GM, and its fellow U.S. carmakers, have profited handsomely from . . . a 25% tariff that has blocked the imports of foreign-made pickups, SUVs, and vans for 56 years. . . . [T]hat market has become its bread and butter.”).

higher prices than sedans for little extra cost”³⁵—all without one word about the higher prices being related to the tariff. Despite the 25% tariff, no one writes about Americans suffering from a shortage of SUVs, either in number or variety; commentators note just the opposite.³⁶ Lastly, no one writes about Americans paying too much for trucks and SUVs because of tariffs.³⁷

Similarly, there are few serious discussions about the negative effects of international trade on employment—and how unevenly the pain is spread. This is not the place for a full-blown discussion of trade-related industrial expansions and contractions, jobs and unemployment, or income inequality. But we know that the huge growth in imports from China following its accession to the WTO *correlated* with a steep decline in manufacturing jobs in the United States.³⁸ While much of that decline is the result of technology, it seems likely that somewhere between one million and 2.5 million manufacturing jobs were lost directly because of Chinese imports.³⁹ As former commerce undersecretary and former dean of the Yale School of Management Jeffrey Garten notes, international

³⁵ Adrienne Roberts & Mike Colias, *Small SUVs Surge as Drivers Ditch Sedans*, WALL ST. J. (Apr. 26, 2019, 10:37 AM), <https://www.wsj.com/articles/small-suvs-loom-larger-for-car-makers-11556184600>.

³⁶ Mike Colias, *Ford Gets Lift from U.S. Truck Demand*, WALL ST. J., Apr. 26, 2019, at B3 (reporting “sharp gains” in sales “from the strength of its pickup truck and sports-utility lineup in the U.S.”); Roberts & Colias, *supra* note 35 (discussing “Americans’ growing preference for sports-utility vehicles” and new models being introduced to meet that demand).

³⁷ It should be added that the lower tariff on passenger cars (2.5%) tempers SUV prices to the degree that many consumers will consider automobiles and SUVs substitutable goods at some price point, i.e. if SUV prices rise too high, many consumers would switch back to conventional passenger cars.

³⁸ According to the U.S. Bureau of Labor Statistics, the United States had 17.3 million manufacturing jobs in January 2000; by January 2004, that number was down to 14.3 million manufacturing jobs, and the lowest number was reached in March 2010 with 11.45 million manufacturing jobs. The number has gradually risen since then to 12.83 million manufacturing jobs. See *Databases, Tables & Calculators by Subject: Employment, Hours, and Earning from the Current Employment Statistics Survey (National)*, U.S. DEP’T LAB. BUREAU LAB. STAT., <https://data.bls.gov/timeseries/CES3000000001> (change “[f]rom” date to “2000”).

³⁹ EDWARD ALDEN, FAILURE TO ADJUST: HOW AMERICANS GOT LEFT BEHIND IN THE GLOBAL ECONOMY 31 (2017) (“Economic analysis that has looked at US regions facing the greatest import competition suggests that the huge growth in imports from China between 1999 and 2011 was likely responsible for the loss of somewhere between 1 million and 2.5 million jobs during a decade in which overall US manufacturing employment fell by nearly 6 million jobs.”).

trade without activist income redistribution has meant tens of millions of Americans were “hit with low wage competition, outsourcing, lower paid jobs, or unemployment” and “China, with its vast industrious labor force, was the coup de grace for millions of US workers.”⁴⁰

Our major newspapers also provide little or no meaningful coverage of how, as Edward Alden notes, “China, Korea, Japan, and most other Asian countries subsidize their companies or protect their markets through discriminatory regulations to gain an edge in global competition.”⁴¹ There is rarely any discussion of how America’s companies face highly subsidized competitors (like Europe’s Airbus⁴²

⁴⁰ Jeffrey E. Garten, *Why Donald Trump and Bernie Sanders Are Half Right About Trade*, FORTUNE (Mar. 29, 2016), <https://fortune.com/2016/03/29/donald-trump-bernie-sanders-trade/>; see also Dani Rodrik, *Globalization’s Wrong Turn*, FOREIGN AFF. (June 11, 2019), <https://www.foreignaffairs.com/articles/united-states/2019-06-11/globalizations-wrong-turn> (“Increased trade with China and other low-wage countries accelerated the decline in manufacturing employment in the developed world, leaving many distressed communities behind.”).

⁴¹ ALDEN, *supra* note 39, at 17.

⁴² While WTO panels ruled that both the US and EU provided illegal subsidies to their respective aerospace champions, it appears that the EU subsidies to Airbus dwarf US subsidies to Boeing by a ratio of somewhere between 2 to 1 and 4 to 1. *EU Paid Airbus Billions in Illegal Subsidies, WTO Rules*, BBC (May 15, 2018), <https://www.bbc.com/news/business-44120525> (reporting that European Countries gave \$22 billion in subsidies to Airbus); *USTR Proposes Products for Tariff Countermeasures in Response to Harm Caused by EU Aircraft Subsidies*, OFF. OF THE U.S. TRADE REP. (Apr. 8, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/ustr-proposes-products-tariff>; *The WTO Dispute: Airbus Advocates Fair and Balanced Trade*, AIRBUS, <https://www.airbus.com/company/responsibility-sustainability/approach-responsible-business/WTO.html> (follow “The EU Case against the U.S. – DS353” hyperlink), (reporting Boeing received “USD 5-6 billion in WTO-inconsistent subsidies disbursed between 1989 and 2006”); The EU “repayable launch investment” loans that underwrote Airbus’ development of the A380, the failed jumbo jet, have turned out to be largely government subsidies that will never fully be repaid. Sylvia Pfeifer, *Airbus Signals Tough Stance on A380 Loans*, FIN. TIMES (Mar. 8, 2019), <https://www.ft.com/content/c74422ee-4102-11e9-9bee-efab61506f44>; Andreas Rinke & Tassilo Hummel, *Germany in Talks with Airbus on 600 Million Euros of A380 Loans*, REUTERS (Mar. 4, 2019), <https://www.reuters.com/article/us-airbus-germany/germany-in-talks-with-airbus-on-600-million-euros-of-a380-loans-idUSKCN1QL0YR> (“Berlin originally loaned Airbus 942 million euros in 2002 for the development of the A380, of which only a third has been repaid”).

and Korea's shipbuilding industry⁴³) or regulatory discrimination (like in China's financial markets). This is not to claim that the United States is a pure market economy; we too subsidize preferred private entities, if more modestly.⁴⁴ The point is only that these observations were largely absent as the American press responded to the Trump trade agenda.

B. Scholarly Analysis of the Trump Administration on Trade

The urge to pile on the criticisms of the Trump Administration and overlook the complexities of trade has not been limited to journalists; it has included our scholarly community, particularly those narrowly focused on trade and economics. Ben Steil is an award-winning economist who is director of international economics studies at the Council on Foreign Relations; in other words, someone we should be able to trust for careful economic analyses. Yet, he and co-author Benjamin Della Rocca posted a March 2018 essay claiming *Trump Steel Tariffs Could Kill 45,000 Auto Jobs, Equal to One-Third of Steel Workforce*.⁴⁵ To reach this initial conclusion, the economists

⁴³ See *Japan To Sue South Korea at WTO over Subsidies to Shipbuilders*, JAPAN TIMES (Nov. 6, 2018), https://www.japantimes.co.jp/news/2018/11/06/business/japan-sue-south-korea-wto-subsidies-shipbuilders/#.XNzBCC_MzML.

⁴⁴ For example, U.S. agricultural subsidies appear to be significantly less than half the subsidies that the EU provides to agricultural producers under the Common Agricultural Policy (about 25 billion dollars versus 58+ billion euros). See *The Common Agricultural Policy at a Glance*, EUR. COMM'N, https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en; Deborah White, *What Are U.S. Farm Subsidies?*, THOUGHTCO. (Jan. 27, 2019), <https://www.thoughtco.com/us-farm-subsidies-3325162>.

⁴⁵ Although the blog post was revised, the initially reported number was used by others. See, e.g., *Study: Trump's Steel Tariffs Could Cost the U.S. Auto Industry 45,000 Jobs*, GUARDIANS OF DEMOCRACY (Mar. 8, 2018), <https://theguardiansofdemocracy.com/study-trump-steel-tariffs-cost-u-s-auto-industry-45000-jobs/> ("President Trump's decision to impose a 25 percent tariff on steel imports could cost the U.S. auto industry 45,000 jobs . . . according to a study by the Council on Foreign Relations."); *Trump Signs Metals Tariffs Sparing Some Allies*, MARKETSCREENER (Mar. 8, 2018, 7:38 PM), <https://www.marketscreener.com/LME-ALUMINIUM-CASH-16159/news/Trump-Signs-Metals-Tariffs-Sparing-Some-Allies-2-26133185/> ("'Trump steel tariffs could kill 45,000 auto jobs, equal to one-third of steel workforce,' was the title of a blog item posted by Council on Foreign Relations analysts shortly before the announcement."); Benn Steil and Benjamin Della Rocca,

“estimate[d] that an average car requires 2.4 tons of steel to build.”⁴⁶ The problem is that the average car produced in America weighs only 2.046 tons in total (4093 pounds)⁴⁷ and a substantial amount of this weight is plastic, rubber, aluminum, and composite materials.

When the error was pointed out, Steil and Rocca changed their estimates of job losses downward based on a car having 1.2 tons of steel,⁴⁸ but even this calculation proceeds on a flawed assumption. The harmonized tariff system of the US (HTSUS) has 17,000+ product categories, so any analysis based on the 1.2 tons of steel in a car being classified as “steel” is likely to be wildly off. For example, all the passenger vehicles produced by BMW at its South Carolina factory have engines imported from Germany and Austria⁴⁹—but those engines are imported under “engine” tariff categories, not steel tariff categories. They are presumably unaffected by higher tariffs on steel.⁵⁰

Trump Steel Tariffs Could Kill 45,000 Auto Jobs, Equal to One-Third of Steel Workforce, HEDGEYE (Mar. 9, 2018, 9:01 AM), <https://app.hedgeye.com/insights/66132-trump-steel-tariffs-could-kill-45-000-auto-jobs-equal-to-one-third-of> (“Based on this relationship, we would expect a 4 percent decline in sales to result in auto-industry job losses of 45,000 by the end of 2019.”).

⁴⁶ Steil & Rocca, *supra* note 45.

⁴⁷ U.S. ENVTL. PROT. AGENCY, EPA-420-R-19-002, THE 2018 EPA AUTOMOTIVE TRENDS REPORT: GREENHOUSE GAS EMISSIONS, FUEL ECONOMY, AND TECHNOLOGY SINCE 1975 (2019) (“Average model year 2017 weight was 4,093, which is up 58 pounds from model year 2016. The preliminary model year 2018 data suggest that weight will be up 1 pound, or essentially unchanged.”). The numbers include pickups and SUVs. *See id.*

⁴⁸ Benn Steil & Benjamin Della Rocca, *Trump Steel Tariffs Could Kill Up to 40,000 Auto Jobs, Equal to Nearly One-Third of Steel Workforce*, COUNCIL ON FOREIGN REL.: GEO-GRAHICS (Mar. 8, 2018), <https://www.cfr.org/blog/trump-steel-tariffs-could-kill-40000-auto-jobs-equal-nearly-one-third-steel-workforce>.

⁴⁹ Amy Wilson, *BMW’s U.S. Plant Finds Its Calling as ExportHub*, AUTOMOTIVE NEWS EUR. (Oct. 31, 2017), <https://europe.autonews.com/article/20171031/COPY/311039994/bmw-s-u-s-plant-finds-its-calling-as-export-hub> (“Engines used at Spartanburg are imported from BMW plants in Austria and Germany.”).

⁵⁰ To get a sense of how off Steil and Rocca were in their quest to prove Trump’s policies wrong, they estimated loss of 40-45,000 jobs “in the U.S. auto industry” based on the steel tariffs, but the Bureau of Labor Statistics actually estimates job growth of 3500 jobs in automobile and automobile part manufacturing in the one-year period since the imposition of the steel tariffs in March 2018. *Databases, Tables & Calculators by Subject: Employment, Hours, and Earning from the Current Employment Statistics Survey (National)*, U.S. DEP’T LAB. BUREAU LAB. STAT., <https://data.bls.gov/timeseries/CES3000000001>.

At least Steil and Rocca are economists attempting to work with economic statistics in their criticism. In contrast, a 2019 op-ed by Nobel-prize winner Paul Krugman argued that “Trump is Losing His Trade Wars” without any data more meaningful than a Fox News poll.⁵¹ As to the revision of NAFTA, Krugman wrote that the “new agreement [is] so similar to the old one that you need a magnifying glass to see the differences.”⁵² No mention of the International Trade Commission study predicting a net gain of 28,000 jobs in the automobile manufacturing sector. Indeed, Krugman’s conclusion that the Trump Administration “is losing” in its efforts to achieve improved trade deals came without any meaningful analysis of the revised KORUS, the USMCA, or the proposals China has put on the table.

A few scholars and commentators have attempted a broader analysis of Trump trade policy, but this is not an easy task. President Trump’s most interesting communications about trade are short [by technical specification], hastily released, and often quickly countermanded or ‘clarified.’ At the same time, the formal pronouncements of the Trump Administration are often not that far from what we are accustomed to hearing from Washington, both from political leaders and from think tanks.

Using recent work by Daniel Chow and Ian Sheldon,⁵³ let us consider what more reflective commentary might discern about Trump trade policy. In their effort to dig into administration policy, Chow and Sheldon quote a long passage from USTR’s *National Trade Policy Agenda* paper which closes with the following:

Finally, we reject the notion that the United States should, for putative geopolitical advantage, turn a blind eye to unfair trade practices that disadvantage

⁵¹ See Paul Krugman, *Trump Is Losing His Trade Wars*, N.Y. TIMES (July 4, 2019), <https://www.nytimes.com/2019/07/04/opinion/trump-trade-wars.html?login=email&auth=login-email>.

⁵² *Id.*

⁵³ Daniel C.K. Chow & Ian Sheldon, *Is Strict Reciprocity Required for Fair Trade?*, 52 VAND. J. TRANSNAT’L L. 1, 9 (2019); Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, STAN. L. & POL’Y REV. (forthcoming 2019).

American workers, farmers, ranchers, and businesses in global markets.⁵⁴

In his 2018 State of the Union address, President Trump similarly pledged that “America has also finally turned the page on decades of unfair trade deals that sacrificed our prosperity and shipped away our companies, our jobs, and our Nation’s wealth. The era of economic surrender is over.”⁵⁵

Chow and Sheldon identify this approach as new, but these statements are not a novel and strange framework in which to understand US trade relations. In 1987, Ronald Reagan said—in his State of the Union Address—that “[w]e are always willing to be trade partners, but never trade patsies.” Presidential *candidates* have had even sharper words. A few years earlier, when he was running against Reagan, former Vice-President Walter Mondale said “[w]e’ve been running up the white flag when we should be running up the American flag . . . What do we want our kids to do? Sweep up around the Japanese computers?”⁵⁶ In 2011, candidate Mitt Romney said Presidents Bush and Obama “have been played like a fiddle by the Chinese” and that the Chinese were “taking our currency and taking our jobs and taking a lot of our future.”⁵⁷ Four years earlier, when he was running for office, Obama called NAFTA “a mistake” and said that “[t]he net costs of many of these trade agreements . . . can be devastating.”⁵⁸

The USTR’s express recognition that we have sometimes sought or accepted trade arrangements for their “putative geopolitical advantage” is more stating the obvious than laying out a dramatic new worldview. When a USAID bag of rice donated to Malawi says, “GIFT OF THE AMERICAN PEOPLE,” that is the result of a balancing of economics and geopolitical interests. The Trans-Pacific Partnership (TPP) was

⁵⁴ OFF. OF THE U.S. TRADE REP., 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (2017) [hereinafter 2017 USTR TRADE POLICY AGENDA], <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>.

⁵⁵ Donald J. Trump, U.S. President, State of the Union Address (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>.

⁵⁶ James Reston, *Mondale’s Tough Line*, N.Y. TIMES, October 13, 1982, at A31.

⁵⁷ Mitt Romney, U.S. Sen., GOP Debate at Dartmouth College (Oct 11, 2011), https://senate.ontheissues.org/Archive/2011_GOP_Dartmouth_Mitt_Romney.htm.

⁵⁸ ALDEN, *supra* note 39, at 53.

pretty clearly both an economic and a geopolitical project; to that end, analysts believed that TPP involved giving up some of our manufacturing interests⁵⁹ to advance other economic and geopolitical interests. In this sense, USTR's 2017 *National Trade Policy Agenda* did not announce a radically new framework; it simply announced that the Trump administration wants to make less investment in the geopolitical order and focus more on our own economic well-being. One can criticize this decision, but economic advantage versus geopolitical advantage has always been a case-by-case calculus in American foreign relations, just as advocacy of human rights and liberal democracy versus geopolitical advantage has always been a case-by-case calculus.

As for specific elements of Trump's trade agenda, Chow and Sheldon quote a passage from the same USTR policy paper saying that "the overarching purpose" of Trump trade policy "will be to expand trade in a way that is freer and fairer for all Americans," including actions that "promote job creation in the United States, promote reciprocity with our trading partners, strengthen our manufacturing base and our ability to defend ourselves, and expand our agricultural and services industry exports."⁶⁰

This again seems pretty standard, except perhaps the references to national defense and "promot[ing] reciprocity with our trading partners." In the 2018 State of the Union address, President Trump similarly noted that "we expect trading relationships to be fair and to be reciprocal"⁶¹ and Vice President Pence has used similar words repeatedly in stating the administration's goals for China-U.S. relations.⁶²

⁵⁹ H.R. COMM, ON WAYS AND MEANS, 114TH CONG., TPP ISSUE ANALYSIS: TRADE IN THE AUTOMOTIVE MANUFACTURING SUPPLY CHAIN 13 (Comm. Print 2016), <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/TPP%20Issue%20Analysis%20-%20Autos.pdf> (concluding that TPP would have meant "that some auto parts that are recurrently produced in the United States for incorporation into automobiles that are made in Canada or Mexico could be produced in third countries such as China, Germany, or Thailand under TPP."); *id.* at 15 (After noting that the 62.5% requirement for a NAFTA vehicle, finding that "[b]y contrast, TPP has a lower overall content requirement for vehicles—45%. That alone creates an incentive to source more parts outside the TPP region.")

⁶⁰ *Id.*; Chow & Sheldon, *supra* note 53, at 9.

⁶¹ Donald J. Trump, State of the Union Address, *supra* note 55.

⁶² Mike Pence, U.S. Vice President, Remarks on the Administration's Policy Toward China at the Hudson Institute (Oct. 4, 2018), <https://www.hudson.org/events/1610->

With this idea of “reciprocity” as a springboard, Chow and Sheldon develop what they believe are three assumptions underlying the Trump trade strategy:

- (1) “that international trade is a zero-sum game in which there can be only one winner and one loser in every trade deal;”⁶³
- (2) that “in order for trade to be fair there must be strict reciprocity in trade volumes or a trade balance between the United States and its trading partners;”⁶⁴ and
- (3) “that the terms and conditions of trade must be strictly reciprocal in order to be fair,” including that “[t]ariff rates must be mirror images of each other.”⁶⁵

Again, Chow and Sheldon are to be commended for this effort to discern the “assumptions” and principles of Trump trade policy. But are these the right assumptions to read from tweets and more traditional tea leaves?

Consider the first assumption that for President Trump, “international trade is a zero-sum game.” This is where we need to parse the general rhetoric of “unfair” trade from the rhetorical flourishes of how the “era of economic surrender is over” (Trump, 2018) and foreigners are “taking our currency and taking our jobs” (Romney, 2011). One can look at a deal that is producing a substantial surplus and say it is “unfair” on the grounds that, while each side is gaining, one side is gaining disproportionately more. It is unfair because you didn’t get as much of

vice-president-mike-pence-s-remarks-on-the-administration-s-policy-towards-china102018 [hereinafter Pence, Hudson Institute Speech] (“We seek a relationship grounded in fairness, reciprocity, and respect for sovereignty . . . we will continue to demand an economic relationship with China that is free and fair and reciprocal . . .”).

⁶³ Chow & Sheldon, *supra* note 53, at 5 (“[t]he first mistake is the assumption that trade is a zero-sum game, suggesting that the country selling products abroad is a winner while the one who buys is a loser. That’s simply wrong.”); *id.* at 16 (citing Veronique de Rugy, *How Trump Misunderstands Trade*, N.Y. TIMES: OP. (April 10, 2018)), <http://www.nytimes.com/2018/04/10/opinion/trump-china-trade-deficit.html> (“Without explanation, the Trump Administration seems to just flatly ignore the large body of theoretical and empirical work that supports the view of trade as a positive-sum game.”).

⁶⁴ Chow & Sheldon, *supra* note 53, at 5.

⁶⁵ *Id.* at 6.

the surplus as you *should have* (however you want to define “should”). Such a conclusion does not *misunderstand* trade.

And there is plenty of evidence to indicate that Trump does believe pre-2018 trade deals were “unfair” in that way. The revised “KORUS” free trade agreement with South Korea and the new NAFTA (“USMCA”) indicate that the Trump team does *not* consider trade a zero-sum game. Treasury Secretary Mnuchin praised the revised KORUS as a “win-win” for both countries⁶⁶ and President Trump called USMCA “a great deal for all three countries.”⁶⁷ One of President Trump’s tweets about negotiations with China was also telling: “China and the United States are working well together on trade, but past negotiations have been so one-sided in favor of China, for so many years, that it is hard for them to make a deal that benefits both countries.”⁶⁸ This is not a statement from someone who believe that international trade deals are invariably zero-sum. But it is a statement consistent with Trump believing himself the master of the “deal”:⁶⁹ successful business deals produce surplus for both parties—it is just a matter of splitting that wealth.

Chow and Sheldon’s third observation is that the Trump team wants terms and conditions of trade to be “strictly reciprocal.” Chow and Sheldon criticize Trump’s demand for the same (“mirror”) tariff rates among trading partners on the grounds that Trump “ignores the dynamics of trade liberalization” and how trade liberalization is a process “where policymakers trade off increased access to their own markets through

⁶⁶ Alan Rappeport & Jim Tankersley, *Trump Gets First Major Trade Deal as South Korea Looks to Avoid Tariffs*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/business/south-korea-us-tariffs.html>.

⁶⁷ Heather Long, *USMCA: Who are the Winner and Losers of the ‘New NAFTA’?*, WASH. POST: WONKBLOG (Oct. 1, 2018), <https://www.washingtonpost.com/business/2018/10/01/winners-losers-usmca-trade-deal/> (quoting Donald Trump (@realDonaldTrump), TWITTER (Oct. 1, 2018, 3:30 AM), [https://twitter.com/realDonaldTrump?refsrc=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor\[hereinafter Trump Twitter\]\]](https://twitter.com/realDonaldTrump?refsrc=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor[hereinafter Trump Twitter]])).

⁶⁸ Damien Paletta, et al., *Penalties Against China Telecom Giant ZTE Become a Bargaining Chip as White House, Chinese Officials Discuss Potential Trade Deal*, WASH. POST: THE SWITCH (May 13, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/13/trump-pledges-to-help-chinese-phone-maker-zte-get-back-into-business/?noredirect=on&utm_term=.173d72c3ff1f (quoting Trump Twitter, *supra* note 67). President Trump ended his tweet with “But be cool. It will all work out.” Trump Twitter, *supra* note 67.

⁶⁹ See generally DONALD J. TRUMP & TONY SCHWARTZ, *THE ART OF THE DEAL* (1987).

tariff cuts in exchange for access to export markets, i.e., the concerns of those lobbying for the import-competing sectors are balanced by those lobbying for the export-competing sectors.”⁷⁰

Chow and Sheldon are certainly correct that five decades of GATT negotiations aimed at *reciprocal*, but not necessarily *matching*, reductions in tariffs; this happened naturally as each negotiating party sought to advance or defend its own commercial interests.⁷¹ But the fact that decades of tariff negotiations focused on macro level reciprocity does not make it wrong to focus on “micro” level reciprocity in individual product and service categories.⁷² In fact, it is reasonable to say that harmonization in the trade system should proceed from the macro to micro levels. The “first-difference reciprocity” achieved in GATT rounds was just a *means* to trade liberalization, not a sacred outcome. Indeed, genuinely *free* trade “would imply full reciprocity of market access.”⁷³ When tariffs on a product are zero on both sides of a trading relationship—which is true “free trade”—the tariffs are “reciprocal” and “mirror.”

For years, any time the U.S. has considered a new trade deal, op-eds and editorials have advocated these deals on the grounds that “our tariffs are already low anyway, so we will only benefit,” without people asking the more basic question: *why have American tariffs been so low compared to most other countries?* Again, after 1945, American administrations wanted to promote trade liberalization as a means of

⁷⁰ Chow & Sheldon, *supra* note 53, at 28 (citing Richard E. Baldwin, *Multilateralizing Regionalism: Spaghetti Bowls as Building Blocs on the Path to Free Trade*, 29 WORLD ECON. 1451, 1459–71 (2006)); see also Martin Wolf, *Trump Declares Trade War on China*, FIN. TIMES (May 8, 2018), <https://www.ft.com/content/dd2af6b0-4fc1-11e8-9471-a083af05aea7> (“The demand that China have the same tariffs as the US is almost as ridiculous. There is no economic case for such a policy. It would be far more reasonable to demand that it move towards the same average tariff as the US or EU.”).

⁷¹ See, e.g., Jagdish N. Bhagwati & Douglas A. Irwin, *The Return of the Reciprocitarians—US Trade Policy Today*, 10 WORLD ECON. 109, 117 (1987) (“Under the GATT, negotiations for trade liberalization generally focus on matching concessions from the initial conditions. Thus reciprocity is sought at the margin, with reciprocity of changes and reductions; that is, first-difference reciprocity.”).

⁷² *Id.* (critiquing the idea “that the reciprocity of access must be met by individual sectors, which is to say at micro and not just the overall macro level”).

⁷³ *Id.* at 122 (“Moreover, first-difference reciprocity was a procedural device; the implicit goal was free trade, more or less, which would imply full reciprocity of market access.”).

strengthening allied economies. To that end, the U.S. agreed to lower tariff rates than most of its trading partners and to have its tariffs “bound” over a wider range of products than most GATT members. America did this at a time when it was the overwhelming economic hegemon. As Jagdish Bhagwati and Douglas Irwin have noted, during the first decades following World War II, “[t]he United States, the undisputed *force majeure*, looked the other way when it came to requiring GATT members to accept symmetric obligations.”⁷⁴ When USTR says that the Trump Administration is de-emphasizing “putative geopolitical advantage,” they are speaking about powerful, off-stage considerations that helped motivate asymmetrical U.S. tariff concessions for decades.

But circumstances change and today, it is fair to ask if it makes sense to have a trading system in which China has a 25% tariff on passenger cars (perhaps reduced to 15% now) while the U.S. has a 2.5-4% tariff. What is the justification for a trading system in which the U.S. has a 4% ad valorem tariff on tires while some large economies have much higher rates (Brazil = 16%, South Africa = 30%)? The Trump team’s call for truly reciprocal tariffs is a little different, but not that far from where the United States has always been. What Bhagwati and Irwin observed in the late 1980s remains true today: “today’s reciprocitarians are well within the American tradition of trade policy.”⁷⁵ And demands for “reciprocity” in international economic relations are not uniquely American: in a major 2019 statement on EU-China relations, the European Commission called for “greater reciprocity,” “reciprocal conditions,” and/or “reciprocal trade” fourteen times in an 11-page document.⁷⁶

III. TRUMP, CHINA, AND THE CONTINUATION OF HISTORY

During the first two years of the Trump presidency, no trade dispute loomed larger than the administration’s showdown with China. As other

⁷⁴ *Id.* (“In the political interest of building a New Europe, for example, the United States allowed asymmetry of access during the long period when Western Europe was shifting to convertibility in current-account transactions.”).

⁷⁵ *Id.* at 120.

⁷⁶ See, e.g., *Joint Communication by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to The European Parliament on EU-China – A strategic outlook*, JOIN(2019) 4 final (Mar. 12, 2019), <https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf> [hereinafter *EU-China – A strategic outlook*].

revised trade agreements were reached, China became *the* trade issue—and it appeared that the Trump Administration finally understood the strategic wisdom of focusing on one or a limited set of trade issues.

The endless stream of stories about tariffs on China may make it difficult to have a clear picture of the tariffs imposed by the United States on Chinese products between January 2017 and summer 2019. What follows is a summary, keeping in mind that when one names an amount of Chinese imports affected, such numbers are *historic*. (Escalating tariffs on one country's products should cause the amount of imports from that country to drop as production shifts to other countries.) The tariffs have been as follows:

Section 232. On 1 March 2018, the United States imposed an additional 25% tariff on steel and 10% tariff on aluminum from all countries, including China. The tariff increases were justified on national security grounds, pursuant to two February 2018 Department of Commerce reports under section 232 of the Trade Expansion Act of 1962.⁷⁷ Over time, exemptions from the additional tariffs were given to Argentina, Australia, Brazil, Canada, the EU, Mexico, and South Korea,⁷⁸ but the tariffs still apply to Chinese steel and aluminum.

Section 301 – 2018 actions

In August 2017, the USTR began an investigation under Section 301 of the Trade Act of 1974 of China's activities in relation to American intellectual property, including forced technology transfers and

⁷⁷ U.S. DEPT. OF COM., SECRETARY ROSS RELEASES STEEL AND ALUMINUM 232 REPORTS IN COORDINATION WITH WHITE HOUSE (2018), <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination> (The investigations were conducted pursuant to 19 U.S.C. § 1862 (Safeguarding national security)).

⁷⁸ David Yanofsky, *Trump's Steel and Aluminum Tariffs Will Now Exempt Most of US Imports*, QUARTZ (Mar. 22, 2018), <https://qz.com/1235803/trumps-steel-and-aluminum-tariffs-which-countries-are-exempt/>; see Reuters, *Factbox: Tariff Wars - Duties Imposed by Trump and U.S. Trading Partners*, YAHOO! (May 6, 2019), <https://news.yahoo.com/factbox-tariff-wars-duties-imposed-trump-u-trading-041454019.html>; see Alan Rappeport, *U.S., Mexico, and Canada Near Deal on Metal Tariffs*, *Mnuchin Says*, N.Y. TIMES, (May 15, 2019).

industrial espionage.⁷⁹ The final report on this investigation was released on 22 March 2018⁸⁰ with a concomitant Presidential memorandum,⁸¹ calling for USTR to draft a “proposed list of products” for increased tariffs, conduct a notice and comment period on the same, and “publish a final list of products and tariff increases.”⁸² That led to additional tariffs imposed on three “lists” of Chinese goods.

- + List 1. A 25% additional tariff was imposed on a list of tariff classifications that covered approximately \$34 billion in goods imported from China; this came into effect in early July 2018.⁸³
- + List 2. A 25% additional tariff was imposed on an additional list of tariff classifications that covered approximately \$16 billion in goods imported from China; this came into effect on 23 August 2018.⁸⁴
- + List 3. A 10% additional tariff was imposed on an additional list of tariff classifications that covered approximately \$200 billion in

⁷⁹ Actions by the United States Related to the Section 301 Investigation of China’s Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13,099 (Mar. 22, 2018) [hereinafter *Actions Related to the Section 301 Investigation*].

⁸⁰ OFF. OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. OF THE PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [hereinafter *Findings of the Section 301 Investigation into China*].

⁸¹ *Actions Related to the Section 301 Investigation*, *supra* note 79, at 13,099.

⁸² *Id.* at 13,100.

⁸³ *United States to Impose Third Set of Section 301 Tariffs on \$200 billion of Chinese-Made Products*, DORSEY & WHITNEY LLP (Sept. 13, 2018), <https://www.dorsey.com/newsresources/publications/client-alerts/2018/09/us-third-set-tariffs-on-products-from-china> [hereinafter Dorsey & Whitney]; *see also* Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 FR 33,608 (July 17, 2018) https://ustr.gov/sites/default/files/301/2018-0026%20China%20FRN%207-10-2018_0.pdf.

⁸⁴ DORSEY & WHITNEY, *supra* note 83.

goods imported from China and came into effect September 2018.⁸⁵

Section 301 – 2019 actions

On 10 May 2019, in response to the then-stalled China-US trade talks, President Trump increased the additional tariffs on the \$200 billion worth of Chinese goods in List 3 from 10% to 25%.⁸⁶

This list does not include smaller actions which are restricting trade with China, including the Commerce Department's self-initiated anti-dumping investigation into Chinese sheet aluminum⁸⁷ or the same department's decision to change rules of origin in relation to anti-dumping orders on solar panels, again hurting Chinese manufacturers.⁸⁸

As one would expect, China imposed its own increased tariffs on

⁸⁵ Press Release, *USTR Finalizes Tariffs on \$200 Billion of Chinese Imports in Response to China's Unfair Trade Practices*, USTR (Sept. 9, 2018) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-finalizes-tariffs-200> (The 10% increase was applied to "5,745 full or partial lines of the original 6,031 tariff lines that were on a proposed list of Chinese imports announced on July 10, 2018."); see generally Tariff List Part 1, *Harmonized Tariff Schedule of the United States*, USTR (September 17, 2018), <https://ustr.gov/sites/default/files/enforcement/301Investigations/Tariff%20List-09.17.18.pdf>.

⁸⁶ Don Lee, *Chinese Goods Hit with Tariff Increase*, L.A. TIMES, May 10, 2019, at 1; David J. Lynch & Damien Paletta, *Trump Doubles Tariffs on \$200 Billion of Chinese Imports, Escalating U.S.-China Trade War*, WASH. POST (May 10, 2019), https://beta.washingtonpost.com/business/economy/ahead-of-us-china-trade-talks-xi-writes-to-trump/2019/05/09/4adb6f10-727f-11e9-9eb4-0828f5389013_story.html?noredirect=on.

⁸⁷ Lori Ann LaRocco, *US Launches Anti-Dumping Case Against Chinese Aluminum Producers Using Rare Aggressive Tactic*, CNBC (Nov. 28, 2017, 12:00AM), <https://www.cnbc.com/2017/11/28/us-launches-antidumping-case-against-chinese-aluminum-sheet.html>. Anti-dumping investigations almost always begin with a petition from U.S. industry or labor; self-initiated anti-dumping actions are permitted under the law, but virtually unprecedented.

⁸⁸ *Canadian Solar v. United States*, 918 F.3d 909, 922 (Fed. Cir. 2019) (upholding Commerce's use of a new test, rather than the typically used "substantial transformation" test, to determine the country of origin, finding solar panels assembled in China came from "China").

American products imported into China,⁸⁹ but because of the trade imbalance—the first level cause of the trade confrontation—retaliatory tariffs were a limited tool for Beijing.⁹⁰ As the trade dispute has worn on, China has moved to other pressure points.⁹¹

While the Trump Administration tariffs may disappear—they could even disappear by the time this article is printed—I believe that the legacy of this trade dispute in China-US relations will be long-lasting. To better understand that, let us first consider the trade dispute as an economic struggle and then, as it is increasingly being understood: as part of a larger geo-political struggle that is emerging. The great irony here is that a President who wanted better trade deals from a business perspective and shorn of geo-politics has triggered a reframing of the China-U.S. relationship as a geo-political competition no different than historical relations among great powers.

A. A Multi-Layered Economic Dispute

The Trump administration's confrontation with China is sometimes presented strictly as an economic dispute. And even the harshest critics of the administration's approach to China invariably recognize that China's economic behavior over the past two decades has become problematic, i.e., that "China notoriously violates the spirit of

⁸⁹ It did this in tranches to parallel U.S. actions. Cyrille Pluyette, *Pékin riposte à Washington en surtaxant 128 produits américaines*, LE FIGARO (April 2, 2018), <http://www.lefigaro.fr/conjoncture/2018/04/02/20002-20180402ARTFIG00104-pekin-riposte-a-washington-en-surtaxant-128-produits-americains.php>; see Jing Shuiyu & Zhong Nan, *China Set to Push back on Latest Levies*, CHINA DAILY (UK), (Sept. 19, 2018), <http://www.chinadaily.com.cn/a/201809/19/WS5ba13e63a31033b4f4656cd1.html> (tariffs on "about \$60 billion worth of imports from the United States in response to Washington's announcement of additional levies on \$200 billion worth of Chinese goods").

⁹⁰ Neil Irwin, *In Trade War, Usual Commerce Rules May Not Apply*, N.Y. TIMES, April 6, 2018, at A6.

⁹¹ See Bloomberg, *China Fines Ford and Probes FedEx*, L.A. TIMES, June 6, 2019, at C2 (observers link trade dispute to recent fines and investigations of American companies in China); see Jason Rogers et al., *Rare Earth Metals Are Bargaining Chip for China*, L.A. TIMES, May 30, 2019, at C4.

international trade rules”;⁹² that “there are many complaints that can justifiably be made about China’s use of trade distorting interventions”;⁹³ “that China is a serious disrupter of trade . . . engages in theft of intellectual property and . . . provides illegal government subsidies that provide a financial advantage to its state-owned companies”;⁹⁴ and that China “engages in a maddening array of tactics that harm U.S. exporters and investors.”⁹⁵

The July 2018 editorial pages of *The Economist* provided this assessment of China’s economic behavior:

Since joining the WTO in 2001, China has not turned toward markets, as the West expected. Instead, it has distorted trade on a scale that is far bigger than the dumping and other causes of disputes between market economies that the WTO was designed to handle. . . . China’s state-owned firms and its vast and opaque subsidies have distorted markets and caused gluts in supply in commodities such as steel. Foreign firms operating in China struggle against heavy-handed regulations, and are required to hand over their intellectual property as a condition of market access.⁹⁶

The Economist judges this to be “Chinese mercantilism”⁹⁷ and, indeed, the real core of China’s economic success has been in playing a

⁹² Paul Krugman, *Trump, Trade and the Advantage of Autocrats*, N.Y. TIMES: OP. (Feb. 25, 2019) (writing that while the trade conflict with China “is essentially Trump’s personal vendetta . . . there are real reasons for the U.S. to be angry at China, and demand policy changes. Above all, China notoriously violates the spirit of international trade rules, de facto restricting foreign companies’ access to its market unless they hand over valuable technology.”).

⁹³ Editorial, *Trump’s irrational trade demands on China*, FIN. TIMES, May 8, 2018, at 8 (“There are many complaints that can justifiably be made about China’s use of trade distorting interventions but to be fair to Beijing it does have a reasonably good record of implementing WTO decisions made against it.”).

⁹⁴ Chow & Sheldon, *supra* note 53, at 32.

⁹⁵ Editorial, *The Escalating Tariff Face-Off*, L.A. TIMES, April 8, 2018, at A17.

⁹⁶ *A Plan to Save the WTO*, THE ECONOMIST, July 21, 2018, at 9.

⁹⁷ *Id.* Many are now referring to Chinese economic policy as ‘mercantilism.’ See, e.g., Letter from Senator Ron Wyden to U.S. Trade Representative Robert Lighthizer, Aug. 2, 2017 (stating that China is competing “through a host of mercantilist policies”) (on file with the author); Greg Ip, *China Started the Trade War, Not Trump*,

strategically astute mercantilist giant working a set of trade rules designed for *market economies*.

Despite these many descriptions and admissions of China's economic behavior, there are rarely good prescriptions on how to respond; instead we usually see vague admonitions to *get tough*. Of course, 'get tough' is what the Trump team did, with at least two distinct levels of economic complaints against Beijing. The first level of complaint has been the trade deficit with China, plain and simple. At this level, the Trump administration never or almost never acknowledges the domestic fiscal policy contributors to chronic U.S. trade deficits (but, in this respect, the Trump team are not especially different from other American politicians).

At the second level, the Administration's complaints are the same as the critics above: that China engages in domestic market manipulation, theft (or forced transfer) of western technology, vast subsidies, antitrust and standardization laws that disadvantage non-Chinese, etc. At this second level, the Administration properly understands these elements as a *robust industrial policy*. To its credit, China has an industrial policy that is thicker and more fulsome than anything the peacetime United States has ever been capable of. This industrial policy has sometimes lacked coordination—as with the substantial overbuilding of Chinese steelmaking capacity—but it certainly has been effective. President Trump's loud demands for action on the trade deficit—the first level of complaint—provided the battle cry for Trump's team to take China to task at this second level.

In 2017 and 2018, Beijing's desire to end the deepening trade confrontation was expressed clearly in state media and—for one accustomed to reading communist propaganda—in more subliminal ways, like the coverage *China Daily* gave to the "UK and France end[ing] scallop war" in which "[n]ations agree [to] peaceful resolution to bitter row."⁹⁸ But Beijing's proposals to end the dispute initially focused on the first level: huge offers to reduce the trade deficit by purchasing tens of billions of dollars a year in additional goods and

WALL, ST. J. (Mar. 23, 2018), <https://www.wsj.com/articles/china-started-the-trade-war-not-trump-1521797401> (quoting trade expert in the U.S. on Chinese officials' "mercantilist policies").

⁹⁸ Jonathan Powell, *UK and France End Scallops War*, CHINA DAILY (UK), Sept. 19, 2018, at 4 (subheading was "Nations agree peaceful resolution to bitter row over dwindling resources").

services from the United States.⁹⁹ These proposals were made in good faith—precisely because Beijing controls a centralized economy. But they also betrayed a failure to recognize or accept the Trump Administration’s second level of complaints. For example, China offered to buy “\$200 billion of American semiconductors over the next six years” but “the Chinese proposal would have American semiconductor companies move finishing and testing facilities from third countries like Vietnam and Malaysia into China . . . bolstering Chinese industry.”¹⁰⁰

This semiconductor proposal demonstrates how the harder problems for negotiators were always going to be the components of China’s robust industrial policy, especially those policies bundled together as “Made in China 2025.”¹⁰¹ Simply put, “many of the Administration’s complaints cut to the core of China’s long-term growth strategy”¹⁰² producing the most intractable set of topics¹⁰³ given the parties’ respective objectives. Indeed, because of those objectives, this is where we may be dealing with a zero-sum game.

Of course, President Xi is right that it is not the United States’ place to “dictate to the Chinese people what should or should not be done”¹⁰⁴

⁹⁹ Nirmal Ghosh, *Cautious Optimism of Deal Emerging as Trade Talks Begin*, THE STRAITS TIMES, Jan. 30, 2019, at A7 (noting “China’s pledge to purchase a substantial amount of goods and services from the United States” and describing this as the “relatively easy one” of “four broad areas” of negotiation); Ana Swanson & Alan Rappeport, *U.S. Wrangles China for Firm Commitments as Trade Talks Continue*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/business/economy/china-us-trade-talks.html> (“The offers include large state-directed purchases of technological goods, natural gas, and soybeans.”).

¹⁰⁰ Swanson & Rappeport, *supra* note 99 (John Neuffer, President of the Semiconductor Industry Association, states that the Chinese proposal “would do little more than rearrange U.S. supply chains and artificially drive them deeper into China.”).

¹⁰¹ Markus Brunnermeier, Rush Doshi, & Harold James, *Beijing’s Bismarckian Ghosts: How Great Powers Compete Economically*, THE WASH. Q., Fall 2018, at 161, 167 (describing “Made in China 2025 initiative” as “a state program that combines industrial policy with legal and illegal methods of obtaining foreign technology on an unprecedented scale.”).

¹⁰² Justin Worland, *When the China Trade War Comes Home*, TIME MAG., (Jan. 21, 2019), <https://time.com/5498915/china-trade-war-affect/>.

¹⁰³ Ghosh, *supra* note 99 (noting “the China 2025 vision” as the “most contentious” component of the China-U.S. negotiations, along with credible enforcement of any agreement).

¹⁰⁴ Worland, *supra* note 102.

for economic development. But Beijing is probably miscalculating if it believes that it can make these issues go away by dropping the “Made in China 2025” moniker¹⁰⁵ and promising to buy more soybeans. If anything, the Trump administration has caused a crystallization of awareness among American and European policymakers of how Chinese industrial policy operates.¹⁰⁶ Businesspeople on both sides of the Pacific need to accept this new reality.

Of course, there are ways to understand—and present—the trade dispute as a deep disagreement among equals. It was China who established a battery of terms and conditions for access to the Chinese market—terms and conditions that were never anticipated by the WTO system. One way to view the Trump Administration’s approach is that they are now playing the same card: the terms and conditions for *China to enjoy access to the United States market* must be an end of the burdensome terms and conditions for access to China’s market. In his finer moments, President Trump describes the problem in an even-handed way, without malice, and simply as a matter of doing business.

B. *Trade and the Return of History*

But the China-U.S. trade confrontation is not merely about trade and doing business; it is part of—or *may be part of*—an emerging geopolitical struggle. That struggle need not and should not become a new

¹⁰⁵ Katherine Ross, *Document Shows China's Propaganda Scheme in U.S. Trade War*, THE STREET, (July 3, 2018), <https://www.thestreet.com/politics/leaked-document-exposes-china-s-plan-to-go-tit-for-tat-with-u-s--14641079> (Propaganda notice published in June 3, 2018, China Digital Times warns Chinese media against using the phrase, ‘Made in China 2025.’ It threatens that ‘there will be consequences.’).

¹⁰⁶ *EU-China – A strategic outlook*, *supra* note 76, at 5–6 (criticizing China for actions in South China Sea and how “China preserves its domestic markets for its champions, shielding them from competition through selective market opening, licensing and other investment restrictions; heavy subsidies to both state-owned and private sector companies closure of its procurement market; localization requirements, including for data; the favouring of domestic operators in the protection and enforcement of intellectual property rights and other domestic laws; and limiting access to government-funded programmes for foreign companies”); Theo Sommer, *The European Union is Trying to Forge a More Robust Partnership with China*, THE GERMAN TIMES, Apr. 2019, at 1 (“in recent years . . . the Europeans have found their relationship with the People’s Republic less and less satisfactory” and reciting the same issues as US officials).

‘cold war,’ although it is sometimes framed in those terms.¹⁰⁷ While our foreign policy establishment understands this geo-political competition, early in the Trump administration our press and many of our legal and economic thinkers continued to write about the dispute in the narrow framework of tariffs, exports, the business community, and the WTO. I blame this initial disconnect on the intellectual shadow cast by a facially wrong idea from the 1990s: the so-called “end of history.”

The WTO’s predecessor, the GATT, debuted at the beginning of the Cold War with 23 founding members. With the possible (but then uncertain) exception of Czechoslovakia, all were aligned with the Allies in WWII and/or linked to the United States or Britain.¹⁰⁸ As the GATT membership expanded in the 1950s and 1960s, the ideological range of member states expanded, but the membership continued to be predominantly countries aligned with the west, neutral countries with democratic societies, and newly independent former colonies. These newly independent states had “gained their independence and took over the rights and obligations of membership that metropolitan powers had accepted on their behalf.”¹⁰⁹ More importantly these new states were

¹⁰⁷ See, e.g., Gregory Mitrovich, *A New Cold War? Not quite.*, WASH. POST (March 21, 2019), https://www.washingtonpost.com/outlook/2019/03/21/new-cold-war-not-quite/?noredirect=on&utm_term=.1b08ef98ef1b (arguing that China is having mixed results on “soft power” projection as compared to the former Soviet Union and that “China will remain a competitor for years to come, but there is still a long way for it to go before the magnitude of its threat reaches that of the Soviet Union, giving both the Chinese and the Americans the opportunity to chart a different course.”); Martin Wolf, *The Challenge Of One World, Two Systems*, FIN. TIMES, Jan. 29, 2019 (“Should we conclude that a new ‘cold war’ has begun? The answer is: yes and no”) [hereinafter Martin, *Challenge of one world*]; Jane Perlez, *Pence’s China Speech Seen as Portent of ‘New Cold War’*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/world/asia/pence-china-speech-cold-war.html>.

¹⁰⁸ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (According to its Preamble, GATT 1947 was the agreement of “[t]he Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.”).

¹⁰⁹ PETER JOHN WILLIAMS, A HANDBOOK ON ACCESSION TO THE WTO 9–11 (2008). In the 1950s, new members included the former Axis powers (Germany, Japan, and

welcomed into the GATT club because the west was competing for their hearts and minds with the Soviet bloc. The Soviet Union, the People's Republic of China, most of the rest of the Soviet bloc, and much of the Arab World remained apart from the GATT-based trading system.

In contrast to the GATT, the WTO was born in the 1990s imbued with a certain *catholicism*. According to the WTO's history of itself, "[s]ince its inception, WTO Members have repeatedly stressed their commitment to making the WTO universal in scope and coverage."¹¹⁰

The organization embodied one of the powerful intellectual memes of that moment: Francis Fukuyama's "the end of history,"¹¹¹ the notion that we had collectively reached the end point of mankind's ideological evolution with the universalization of Western liberal democracy as the final form of human government.¹¹² Even if all states were not yet representative democracies, there was no serious ideological or organizational alternative; all we needed to do was keep the peace and increase globalization until everyone 'harmonized' toward western ideals. The accession of China to the WTO in 2001 embodied that great, if implicit, hope: that humanity had ended great power, ideological struggles; that a set of ideals about human rights, representative government, and market capitalism would gradually strengthen its grip on everyone,¹¹³ and that *Pax Americana* could elide into a *Pax Allianza*.

Italy), then allied militarily with the US, as well as Ghana, Malaysia, Nicaragua, Peru, Sweden, Turkey, and Uruguay. In the 1960s, the membership expanded to include Austria, Argentina, Barbados, Cyprus, Iceland, South Korea, Poland, Switzerland, and many newly independent African countries (Benin, Burundi, Cameroun, Central African Republic, Chad, Congo, Cote d'Ivoire, Kenya, Malawi, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, and Uganda.); For a list of accession dates to the GATT, see *The 128 countries that had signed GATT by 1994*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/gattmem_e.htm.

¹¹⁰ WILLIAMS, *supra* note 109.

¹¹¹ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

¹¹² Francis Fukuyama, *The End of History?*, 16 THE NAT'L INT. 3, 4 (1989).

¹¹³ Pence, Hudson Institute Speech, *supra* note 62 ("After the fall of the Soviet Union, we assumed that a free China was inevitable. Heady with optimism, at the turn of the 21st Century, America agreed to give Beijing open access to our economy, and bring China into the World Trade Organization"); Rodrik, *supra* note 40 ("An important element of hyper-globalist triumphalism was the belief that countries with different economic and social models would ultimately converge, if not on identical models, at least on sufficiently similar market economy models. China's admission to the WTO, in particular, was predicated on the expectation in the West that the state would give up directing economic activity.").

Since 2001, China has unquestionably gone through periods where economic reform moved toward a market economy, but the 2008 global financial crisis helped convince many in Beijing that they could improve on western market orthodoxies. Meanwhile, increasing wealth meant increasing power. And, as Aaron Freidberg notes, “fast-rising states have historically tended to seek regional, if not global, hegemony, pursuits that have often brought them into conflict with the dominant powers of their day.”¹¹⁴ China under Xi Jinping behaves predictably for those who knew that history does not end. Russia’s leadership also seems not to have gotten the memo/meme about history being finished. Counting China, a militant Russia, and a persistent Iran as the main competitors to *Pax Americana*, Michael Mandelbaum observes that “[n]ow, as before, the revisionist powers are dictatorships that challenge American values as well as American interests.”¹¹⁵

In the foreign policy establishment (as distinct from the international trade crowd), there is a keen awareness of China as both economic partner and geopolitical competitor. By mid-2019, that framework seemed to be seeping into the American mainstream.¹¹⁶ Chinese commentators also clearly understand the issues in broader terms, sometimes framing the problem as one of “coexistence” for “the established power and the rising power,” the problem of two “rising” powers together,¹¹⁷ or that Americans must respect China by “recognizing its natural sphere of influence.”¹¹⁸ This frame of reference is so strong that Chinese thinkers — from Xi Jinping down — have downplayed the dangers of China and the United States falling into a

¹¹⁴ Aaron Friedberg, *The Signs Were There in Did America Get China Wrong? – The Engagement Debate*, FOREIGN AFF., July/Aug. 2018, at 183.

¹¹⁵ Michael Mandelbaum, *The New Containment – Handling Russia, China, and Iran*, FOREIGN AFFAIRS, Mar./Apr. 2019, at 123.

¹¹⁶ See, e.g., Don Lee, *For the U.S. and China, it's not a trade war anymore – it's Something Worse*, L.A. TIMES, June 2, 2019.

¹¹⁷ Wang Jisi, *The View from China in Did America Get China Wrong? – The Engagement Debate*, FOREIGN AFFAIRS, July/Aug. 2018 (“In reality, compared with most other countries in the world, both China and the United States are rising powers.”).

¹¹⁸ Eric Li, *Better Together*, in *Did America Get China Wrong? – The Engagement Debate*, FOREIGN AFF., July/Aug. 2018 (“If the United States treats China, and indeed also Russia, with the respect that such a great power deserves by recognizing its natural sphere of influence, it will have a chance to remain the world’s most powerful country for a long time.”).

“Thucydides trap” that is, new and established economic powers with different ideologies going to war with one another.

Of course, recognition of China as a “rising power” begs more questions than it answers. Does China want to replace the United States as the preeminent superpower? Or does China just want dominance in East Asia and the western Pacific?¹¹⁹ Will China’s rise arrest global progress on human rights and representative democracy? And while the command structure in China is highly centralized,¹²⁰ anyone who thinks that there is a single “China” to answer any of these questions does not appreciate the diversity of thinking among China’s sophisticated elites.

In all this, we must keep in mind that competition between the U.S. and China is very different from the competition between the U.S. and the Soviet Union, 1947-1992. On the bright side, whatever China’s motives — and those motives may change with different leaders — China is not “a single mortal threat . . . committed to remaking the entire world in its own image.” Because of its Marxist ideology, the Soviet Union treated foreign policy as somewhere between a relationship among sovereign states and an international civil war.¹²¹ Ideologically, Xi Jinping’s worldview is mainly a *nullification* of western values, i.e. that a wealthy, stable future can be constructed on a distinctly Chinese foundation that does not need individual civil rights or representative democracy as central pillars. If China has any cohering ideology now, it is *nationalism* — and that China must be recognized by others as the “middle kingdom,” that is, at the center of the globe. That is neither an

¹¹⁹ Oriano Skylar Mastro, *The Stealth Superpower: How China Hid Its Global Ambitions*, FOREIGN AFF., Jan./Feb. 2019, at 31 (“In the Indo-Pacific region, China wants complete dominance; it wants to force the United States out and become the region’s unchallenged political, economic, and military hegemon.”).

¹²⁰ So much so that a reputable media source can still refer to a single “propaganda department” for China. See, e.g., Sui-Lee Wee & Li Yuan, *China Censors Bad Economic News Amid Signs of Slower Growth*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/business/china-censor-economic-news.html> (“China’s propaganda department couldn’t be reached late Friday for comment.”).

¹²¹ HENRY KISSINGER, AMERICAN FOREIGN POLICY 122 (3rd ed. 1977) (noting that by the late 1970s the “Soviet Union ha[d] begun to practice foreign policy—at least partially—as a relationship among states rather than an international civil war.”).

ideology that exports nor one that endears a country with other nations or peoples.¹²²

But while China does not have an ideological mission on par with 20th century Marxism, it does have two things Americans sorely need to remember. First, China does offer an alternative social and economic organization, one increasingly bent on surveillance and micromanagement of its citizenry;¹²³ that approach to governance *will* appeal to *some* leaders in *some* countries. Second, China has a difficult lineage in foreign affairs, with a history of being regionally dominant and then quickly humbled by western Europeans. The specter of “unequal treaties” and a “Century of Humiliation” beginning with the Opium Wars weighs heavily on Chinese thinkers. And that goes both ways. As Henry Kissinger observed in the 1970s,

A strong China has historically tended to establish suzerainty over its neighbors; in fact, one special problem of dealing with China – Communism apart – is that it has had no experience in conducting foreign policy with equals. China has either been dominant or subjected.¹²⁴

¹²² Mastro, *supra* note 119, at 39 (China’s “leaders have failed to articulate a vision of global dominance that is beneficial for any country but China”); Wolf, *supra* note 107 (“China is not exporting a global ideology, but behaving as a normal great power.”).

¹²³ Elizabeth Economy, *The Problem with Xi’s China Model*, FOREIGN AFF. (Mar. 6, 2019), <https://www.foreignaffairs.com/articles/china/2019-03-06/problem-xis-china-model> (“As many as 200 million surveillance cameras have already been installed in an effort to reduce crime and control social unrest. The surveillance technology will also play an essential role in the 2020 national rollout of the country’s social credit system, which will evaluate people’s political and economic trustworthiness and reward and punish them accordingly.”); Sui-Lee Wee, *China Uses DNA to Track Its People, With the help of American Expertise*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/business/china-xinjiang-ughur-dna-thermo-fisher.html> (36 million people, principally Muslim Uighurs in Xinjiang, participated in program to collect DNA samples, images of irises, and other personal data).

¹²⁴ KISSINGER, *supra* note 122, at 91. Perhaps decades of interaction with other Communist regimes 1950-1992 produced a better sense of equal foreign nations, but Kissinger’s comment resonates with a 1919 observation by Lu Xun that the Chinese historically viewed foreigners as “either ‘beasts’ or ‘royal highnesses.’ They have never been called friends, nor said to have anything in common with us.” LU XUN, *Impromptu Reflections No. 48*, JOTTINGS UNDER LAMPLIGHT 253, 253 (Eileen J. Cheng & Kirk A. Denton eds., 2017).

American policy makers need to be sensitive to this frame of reference on the Chinese side. When Chinese negotiators repeatedly urge the United States to meet them “halfway”¹²⁵ or on “even ground,”¹²⁶ this reflects their desire (and need) to establish a deal *between equals*.

On the other hand, the Chinese need to understand that the litany of unkept commitments by China makes the “meet half-way” offer sound, to westerners, like more of the same. Indeed, by 2019, one of the recurring themes among commentators is how Beijing makes the same promises over and over — and does not abide by those commitments. Perhaps this is the great divide in the mindset of the two negotiating teams.¹²⁷ The Trump Administration insists that there be mechanisms to determine Chinese compliance with any agreement.¹²⁸ From the American perspective, 20-40 years of unkept Chinese promises makes this insistence justified. But for the Chinese side, compliance

¹²⁵ Zhao Huanxin, *Wang Yi: Meet China ‘Halfway’ on Trade Issues*, CHINA DAILY, <http://www.chinadaily.com.cn/a/201806/15/WS5b23d7e4a310010f8f59d3fa.html> (last updated June 15, 2018) (statement from Foreign Minister Wang Yi) (“We hope the US side can meet China halfway. . . .”); Zhao Huanxin & Jing Shuiyu, *China ‘Sincere’ on Trade Talks*, CHINA DAILY, <http://www.chinadaily.com.cn/a/201905/10/WS5cd4aad9a3104842260bad34.html> (last updated May 10, 2019) (quoting Foreign Ministry spokesperson Geng Shuang); David J. Lynch & Damien Paletta, *Trump Doubles Tariffs on \$200 Billion of Chinese Imports, Escalating U.S.-China Trade War*, WASH. POST (May 10, 2019), https://www.washingtonpost.com/business/economy/ahead-of-us-china-trade-talks-xi-writes-to-trump/2019/05/09/4adb6f10-727f-11e9-9eb4-0828f5389013_story.html (statement from Chinese spokesman) (“We hope that the U.S. and China will meet each other halfway and make joint efforts to solve the existing problems through cooperation and consultation”).

¹²⁶ Robyn Dixon, *Wary China Set to Talk Trade with U.S.*, L.A. TIMES, June 20, 2019, 2018, at C1, C5 (statement from Xi Jinping) (“[a]ny deal would have to be reached ‘through dialogue on even ground. . . .’”).

¹²⁷ This conceptual divide has been noted by others. See, e.g., David J. Lynch, *With One Eye on the Past, Trump and Xi: Look to the Future of U.S.-China Trade*, WASH. POST (May 9, 2019), https://www.washingtonpost.com/business/economy/with-one-eye-on-the-past-trump-and-xi-look-to-the-future-of-us-china-trade/2019/05/08/6c1c232a-71d7-11e9-9f06-5fc2ee80027a_story.html (noting that the “Trump administration looks at the past 20 years of agreements with China as an unbroken record of cheating and broken promises” while history of “unequal treaties” makes “Beijing reluctant to accept terms that might be seen at home as foreign dictates”).

¹²⁸ Martin Wolf, *The Chinese Economy is Stabilizing*, FIN. TIMES (Apr. 2, 2019), <https://www.ft.com/content/37ac5f08-5529-11e9-91f9-b6515a54c5b1> (“[T]he US seems determined to monitor Chinese behavior, with the intention of imposing penalties (that is, tariffs) whenever China is judged to be backsliding.”).

mechanisms risk creating the appearance of foreign meddling in Chinese internal affairs and the unequal treaties of old.

And unlike competition with Russia or Iran, China-U.S. competition has a simple, hard nugget problem at its core. In our past peaceful geopolitical and ideological struggle with the Soviet Union, economic relations between the U.S. and the U.S.S.R. were minimal.¹²⁹ So the problem for both sides in the China-US equation is: *how does one manage a long-term, but potentially intense geo-political competition with an economy with which one has become substantially intertwined?*

One obvious way to manage the relationship is to diminish some of the economic interdependence. That has started to happen and the longer the trade dispute between China and the US continues/d—and the more President Trump made it the subject of intermittent blow-ups and reversals—the more investors will move their productive assets out of China.¹³⁰

In late 2018, a UBS survey of chief financial officers at export-oriented manufacturers in China “found that a third had moved at least some production out of China in 2018” and “[a]nother third” intended to do so in 2019.¹³¹ In a short amount of time, *some* production has shifted from mainland China to India, Vietnam, Malaysia, Mexico, Thailand,

¹²⁹ Mandelbaum, *supra* note 115 (noting “the Soviet Union was largely detached from the U.S.-centered global economy during the Cold War . . . but China has the world’s second-largest economy, with deep, wide, and growing connections to countries everywhere.”).

¹³⁰ Keith Bradsher, *One Trump Victory: Companies Rethink China*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/business/china-trade-trump-jobs-decoupling.html>; Economy, *supra* note 123 (“[T]he U.S. government’s enforcement of tariffs on \$250 billion in Chinese exports to the United States has . . . caused some multinational corporations to shift or consider shifting manufacturing out of China to other countries.”); Charlene Barshefsky, *Vietnam Should Repeal New Law Choking Cross-Border Data Flows*, THE STRAITS TIMES (Jan. 30, 2019), <https://www.straitstimes.com/opinion/vietnam-should-repeal-new-law-choking-cross-border-data-flows> (Malaysia, Indonesia, and Thailand “stand to gain from the ongoing US-China trade tensions, as global companies seek to diversify away from China while retaining a presence in the region.”).

¹³¹ Bradsher, *supra* note 130; see also Don Lee, *Tariffs are Causing Damage to More U.S. Businesses*, L.A. TIMES, September 13, 2018, at A1, A8 (Chicago-based “Reshoring Initiative”) (finding 16 “companies moving jobs or investment back to the U.S. at least in part because of the threat of tariffs.”). Continued uncertainty continues the trend. See James F. Peltz, *Bracing for Tariffs on Everyday Items*, L.A. TIMES, May 19, 2019, at C1, C7 (retailers are “trying to find alternative manufacturers in other countries”).

Taiwan, and the United States for a range of products that includes steel,¹³² aluminum, air conditioner parts,¹³³ auto parts,¹³⁴ LED light bulbs,¹³⁵ smartphones,¹³⁶ toys,¹³⁷ shoes,¹³⁸ poster board, paper products, knitted and crocheted fabrics, silk yarn, and garlic cloves.¹³⁹ One should emphasize this is *some* production and that some shift was underway prior to 2017 because of rising wages for Chinese workers. But the narrative has shifted from how intertwined the China-U.S. supply chains

¹³² Ralph Jennings, *Vietnam Booming, Aided by Old Foe*, L.A. TIMES, January 3, 2019, at A3 (shifting steel production).

¹³³ Matthew Townsend & Eric Martin, *Mexico is a Clear Winner in the U.S.-China Trade War*, L.A. TIMES, March 28, 2019, at C1, C1 (aluminum, air conditioner parts, poster board, paper products, knitted and crocheted fabrics, silk yarn, and garlic cloves).

¹³⁴ Bradsher, *supra* note 130 (“Some auto part companies have run their American factories more hours each day to avoid tariffs on Chinese-made goods. . . .”); Ana Swanson, *Trump’s Trade War With China Pierces the Heart of Michigan*, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/us/politics/trade-war-china-michigan.html> (statement of expert) (“[T]he tariffs are actually encouraging some Chinese companies to move their operations to the United States, especially if they are seeking to supply the American market.”).

¹³⁵ Neil Irwin, Alexandra Stevenson & Claire Ballentine, *Trade War may Evolve in Complex Patterns*, N.Y. TIMES [INT’L EDITION] (June 25, 2018), <https://www.nytimes.com/2018/06/23/upshot/what-a-trade-war-with-china-looks-like-on-the-front-lines.html> (describing how Malaysia will compete better to supply LED light bulbs).

¹³⁶ Bradsher, *supra* note 130 (reporting “Sony’s closure of a Beijing smartphone factory last month after expanding production in Thailand”); *The Technology Industry is Rife with Bottlenecks*, THE ECONOMIST: PINCH POINTS, June 8, 2019, at 58, 59 (“Samsung has already moved most of its smartphone production to Vietnam”); David Pierson & Sam Dean, *Trump’s Huawei ban could upend global tech industry*, L.A. TIMES, May 23, 2019, at C1, C4 (“Foxconn has been reported to be considering opening an iPhone facility in Vietnam in order to sidestep a trade war.”).

¹³⁷ Bradsher, *supra* note 130 (“Hasbro, the world’s leading toymaker, has a goal . . . ‘to be 60 percent out of China’” by the end of 2020. “Hasbro is moving its toy making to the United States, Mexico, Vietnam and India.”).

¹³⁸ *Id.* (“Steve Madden, the shoe company, is moving production to Cambodia.”).

¹³⁹ Townsend & Martin, *supra* note 133 (mentioning those products); Sophia Kunthara, *The Market Thinks the Trade War Stinks. A California Garlic Grower Disagrees*, SAN FRANCISCO CHRON. (May 19, 2018), <https://www.sfchronicle.com/business/article/The-markets-think-the-trade-war-stinks-A-13857789.php> (major U.S. garlic producer returning to production levels before surge in Chinese imports).

are to how quickly they seem to be decoupling.¹⁴⁰ Even *China Daily* recognizes this is happening.¹⁴¹ Indeed, 2+ years of higher tariffs and tariff uncertainties is pushing even Chinese companies to move some production out of mainland China.¹⁴²

In a new collaborative-competitive relationship, Americans are likely to remain keenly aware of — or no longer politely ignore — the fact that ‘commitments’ by Chinese counterparts are not commitments as westerners have historically understood them. This includes an increasing awareness among western policymakers that deals with China have too often left more “wiggle room” than an average deal — space for defying the spirit, if not the letter, of an agreement.¹⁴³ Indeed, Americans are partially to blame for this, launching the modern era of US-China relations with the “creative ambiguity” of the 1972 Shanghai

¹⁴⁰ Tim Culpan, *iPhone is Made in China – and in U.S., Europe, Taiwan*, L.A. TIMES, June 13, 2019, at C2 (concluding “[i]t wouldn’t take much for Apple Inc. to have US-sold iPhones made outside China.”); THE ECONOMIST: PINCH POINTS, *supra* note 136 (“Many firms will speed up efforts to bypass China – for instance by building factories in places like India or Mexico.”); *Bully for You*, THE ECONOMIST, June 8, 2019, at 65 (stating that “[t]ariffs certainly seem to be spooking some into avoiding China” and that “companies are increasingly sourcing from elsewhere, and ‘localizing’”).

¹⁴¹ Zhao Huanxin, *Tariffs Will Raise Prices and Ruin Companies, Hearings Are Told*, CHINA DAILY, June 24, 2019, at 1, 2 (quoting from a New Balance official) (“We have undertaken significant effort to redirect sourcing to non-Chinese suppliers wherever possible, but these supply chains take a minimum of 18 months to redirect and in some cases cannot be fully recreated outside China . . .”).

¹⁴² Emily Feng, *Beijing Shifts Steel Production Overseas as It Reduces Exports*, FIN. TIMES (June 24, 2018), <https://www.ft.com/content/dfa122b8-6f95-11e8-92d3-6c13e5c92914> (describing movement of Chinese steel plants to southeast Asia, reduction of Chinese steel capacity at home, and concluding “analysts say the biggest factor behind Chinese producers looking abroad is the desire to directly produce and sell in fast-growing markets and avoid US tariffs”); Jennings, *supra* note 132 (documenting Chinese investment in Vietnam “largely to escape the trade war with the U.S.”).

¹⁴³ Julie Hirschfeld Davis & David E. Sanger, *Obama and Xi Jinping of China Agree to Steps on Cybertheft*, N.Y. TIMES (Sept. 25, 2015), <https://www.nytimes.com/2015/09/26/world/asia/xi-jinping-white-house.html> (“Even the agreement on cybersecurity left room for differences . . . while Mr. Obama said they had agreed on ‘the principle that governments don’t engage in cyberespionage for commercial gain against companies,’ Mr. Xi said nothing of computer-enabled spying, speaking only of ‘cybercrime,’ a narrower formulation.”).

communiqué and accepting questionable or loose translations from English to Chinese.¹⁴⁴

If this is correct, going forward, American and other western negotiators are likely to insist on verifiable, measurable benchmarks of compliance. And Chinese negotiators may be understandably resistant to quantification of measures for deal-compliance, not only because this seems to intrude in domestic affairs but perhaps because vague commitments are more compatible with traditional Chinese thinking.¹⁴⁵ This appears to be what happened when China and the U.S. seemed close to a trade deal in early May 2019: the Chinese expected their commitments could be vague and when they understood that the Trump team wanted very specific commitments on laws to be repealed, laws to be amended, and actions to be stopped, Beijing walked back some of those offers.¹⁴⁶

Far more corrosive of future agreements is the increased awareness in the United States and Europe that Beijing often simply does not keep to the bargains it strikes. While western countries might have a fairly strict idea of *pacta sunt servanda*,¹⁴⁷ Beijing seems to have — and wants to preserve — a more exculpatory understanding of *clausula rebus sic stantibus*, i.e. that commitments can be avoided when there is a change in circumstances.

¹⁴⁴ See Neil Thomas, *When It Comes to Negotiating with China, the Devil is in the Details*, WASH. POST (Mar. 26, 2019), https://www.washingtonpost.com/outlook/2019/03/26/when-it-comes-negotiating-with-china-devil-is-details/?noredirect=on&utm_term=.e89af0ecb318.

¹⁴⁵ See, e.g., LIN YUTANG, *MY COUNTRY AND MY PEOPLE* (1936) (especially Chapters 3 & 4). Of course, China's recent substantial accomplishments in science and technology, e.g. its space program, show a society quite capable of precise quantitative thinking.

¹⁴⁶ Ana Swanson & Keith Bradsher, *Trump Advisers Accuse China of Reneging on Trade Commitments*, N.Y. TIMES (May 6, 2019), <https://www.nytimes.com/2019/05/06/us/politics/trump-tariffs-china.html> (stating that USTR returned from trade negotiation "dismayed by China's refusal to mention commitments it had made to update various Chinese laws in the final text of the trade agreement").

¹⁴⁷ Arguably the oldest principle of international law, "*pacta sunt servanda*" is enshrined in Article 26 of the Vienna Convention of the Law of Treaties (1969) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). See generally Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959); Manfred Lachs, *Pacta Sunt Servanda*, in 7 ENCYCLOPEDIA OF PUB. INT'L L. 364 (1984).

Along these lines, there are multiple lessons to be drawn from Obama and Xi Jinping's 2015 "common understanding" that neither the United States nor China should engage in state-sponsored cyberintrusions to poach intellectual property. . . ."¹⁴⁸ In the case of the Xi-Obama agreement, while U.S. cybersecurity firms "concluded that cyber intrusions against U.S. firms by Chinese state-sponsored and supported hackers since September 2015 have decreased or become more difficult to detect, none has concluded that the activity has ceased entirely."¹⁴⁹ In other words, there was some honoring of the commitment. But equally important, in the decline in cyberintrusions was followed by a dramatic uptick in Chinese cyberattacks on American companies following Trump trade demands on China, causing U.S. intelligence officials to conclude that "the 2015 agreement appears to have been unofficially canceled amid the continuing trade tensions between the United States and China"¹⁵⁰

And sometimes China decides not to fulfill its commitments, even without substantial change in circumstances. The 2012 U.S.-China Film Agreement is an example of a bilateral commitment by China that has remained unfulfilled, although changing circumstances would make it *easier* for China to meet its commitments under the agreement.¹⁵¹ A broader example is China's unfulfilled commitments to open its financial services sector.¹⁵²

¹⁴⁸ Davis & Sanger, *supra* note 143.

¹⁴⁹ *Findings of the Section 301 Investigation into China*, *supra* note 80, at 169.

¹⁵⁰ Nicole Perlroth, *Chinese and Iranian Hackers Renew Their Attacks on U.S. Companies*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/technology/hackers-chinese-iran-usa.html>. And a reasonable person could assume that the American government engages in substantial cybersurveillance and espionage against the Chinese government, if not its companies. See, e.g., Nicole Perlroth, David E. Sanger & Scott Shane, *How Chinese spies got the N.S.A.'s Hacking Tools, and Used Them for Attacks*, N.Y. TIMES (May 6, 2019), <https://www.nytimes.com/2019/05/06/us/politics/china-hacking-cyber.html>.

¹⁵¹ See *Independent Film and Television Alliance*, Letter from Independent Film and Television Alliance to USTR (2015), <http://www.ifta-online.org/sites/default/files/IFTA%20Comments%20in%20response%20to%20USTR%20Request%20Concerning%20China's%20Compliance%20with%20WTO%20Commitments%202015-0010%20September%2023,%202015.pdf>.

¹⁵² In its 2001 WTO accession commitments, China agreed that by December 2006 "foreign financial institutions will be permitted to provide services to all Chinese clients" in RMB and foreign currency; in 2012, the WTO found that China had still

The Trump team has a keen awareness of all this,¹⁵³ an awareness that is taking hold in DC policy circles—and probably in European capitals as well. Perhaps this will mean that the United States and China are less able to enter into any agreements beyond what is absolutely needed. Perhaps it will mean that comprehensive agreements are less doable than deals on narrowly drawn, specific issues.

IV. WHAT THIS LIKELY MEANS FOR THE BUSINESS COMMUNITY

What does all this mean for the business community in the United States? On the general ledger, the international policy of the Trump Administration has been much more consistent with post-WWII American policies than headlines and presidential tweets suggest. Still the international business environment has changed—significantly. And there are good reasons to think much of the change will survive Donald Trump's passing through the swamp of Washington.

On trade relations generally, the revision of NAFTA (the USMCA) may or may not prove acceptable to Congress. But even if it is rejected in its present form, my guess is that any revision of the terms of trade among the North American economies will be likely to emphasize enhanced industrial production within the NAFTA zone as well as improvements in environmental and labor standards. Similarly, if the Trump Administration's quieter negotiations with Japan and the EU produce any results, the changes are likely to strengthen industrial

not fulfilled key commitments to open financial services. See World Trade Organization, Panel Report, China—Certain Measures Affecting Electronic Payment Services, DS413 (2012), [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds413/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds413/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#). New Chinese banking regulations in 2017 made it clear that compliance in opening its market is still years away. See Doug Palmer, *China drags its feet on opening market to electronic payments like Visa and MasterCard*, POLITICO (July 7, 2017), <https://www.politico.com/story/2017/07/12/china-drags-feet-on-key-100-day-plan-commitment-240455>. Maintaining a closed market allowed Chinese companies, especially Alipay and Tencent, to grow into global players.

¹⁵³ See, e.g., Bob Davis, *The Man Behind Trump's China Fight*, WALL ST. J., Apr. 7–8, 2018, at A1 (“China is tap, tap, tapping us along,” [USTR Lighthizer said], meaning it regularly promised policy changes but didn’t deliver.”); Swanson & Rappeport, *supra* note 99 (“American officials are increasingly focused on ensuring that China, which has often reneged on promises to past administrations, actually adheres to any agreement.”).

production among developed countries; give increasing recognition to wage, labor, and environmental standards; and involve a rebalancing of interests among the heavily subsidized and quirky agricultural markets of developed countries. In all this, we might consider one Chinese analyst's concern in 2018 over "the possible emergence of a zero-tariff club of select developed nations."¹⁵⁴ While a zero-tariff club is not likely, it is possible that future trade 'liberalization' will take the form of deals among similar economies—more like the initial GATT—and less like the global, multilateral system we grew accustomed to after 1994.

For China, it is very possible that Beijing will make many of the structural reforms advocated by the Trump administration, with or without a comprehensive trade deal. For example, China's new Foreign Investment Law is slated to come into effect on January 1, 2020, allowing foreigners to own businesses and capital assets in China on something closer to conditions in developed economies.¹⁵⁵ Reform efforts in Beijing have always had to avoid the appearance of China acceding to foreigners' demands; a reliable way to do this is to present the reform as something China wants or *should want*, whether it is improved enforcement of intellectual property¹⁵⁶ or loosened restrictions on foreign investments. On this count, *failure* to get a comprehensive trade deal with the United States may not jinx structural reforms in the Chinese economy—indeed, it might make them easier.¹⁵⁷ Other reforms may continue, including in response to pressure at the WTO (an agreed *multilateral* forum versus *unilateral* American demands). For example, Dan Prud'homme and Max von Zedtwitz believe that "the rapidness of the changes" circa 2018-2019 in Chinese laws implicated in forced

¹⁵⁴ Wang Huiyao, *The Multilateral Trade System Must be Protected*, CHINA DAILY (UK Weekend), Sept. 21–23, 2018, at 7 (suggesting that US deals with "developed countries" point in that direction).

¹⁵⁵ Mark Schaub, *Open for Business*, CHINA DAILY: GLOBAL ED., May 10, 2019, at 13 (the new Foreign Investment Law "will allow existing joint ventures to be restructured to models that better allow for the majority shareholder to make decisions — subject to some caveats").

¹⁵⁶ *Id.* (China "has placed great emphasis—as much for its internal development as for placate overseas rights holders—on improving and enforcing the rights of intellectual property holders").

¹⁵⁷ For a discussion of how Chinese domestic reform may continue in some investment, intellectual property, and technology areas, see Mark Cohen, *Unpacking the Role of IP Legislation in the Trade War*, CHINA IPR (May 19, 2019), <https://chinaipr.com/2019/05/19/unpacking-the-role-of-ip-legislation-in-the-trade-war/>.

technology transfer “appear to be in response to the WTO complaints lodged against China by the US, EU, and other nations.”¹⁵⁸

In the medium-term, it is also reasonable to expect that American and European officials will continue to ratchet up their scrutiny of Chinese investments. Indeed, the high-profile debate over Huawei¹⁵⁹ actually masks the more structural changes that are taking place. In 2018, Congress expanded the authority of the Committee on Foreign Investment in the United States (CFIUS) to review foreign investments into the United States; the changes in the law were intended to address growing national security concerns over Chinese exploitation of certain investment which traditionally have fallen outside of CFIUS jurisdiction.¹⁶⁰ Some of the jurisdictional expansion sounded Cold War-like,¹⁶¹ while other aspects of the expansion seem focused on Chinese acquisition of American technology and know-how.¹⁶² There were over a dozen Chinese acquisitions nixed by North American regulators in 2018.¹⁶³ CFIUS has also opposed ownership deals that would potentially give Beijing access to substantial information about American citizens. Thus, the Committee opposed Chinese acquisition or ownership of Moneygram International [used by lower income citizens, especially

¹⁵⁸ Dan Prud'homme & Max von Zedtwitz, *Managing 'Forced' Technology Transfer in Emerging Markets: The Case of China*, 25 J. INT'L MGMT. 3, 2019, at 10.

¹⁵⁹ See, e.g., Susan Decker, *FCC Chief Resists China Mobile's Bid to Serve U.S.*, L.A. TIMES (Apr. 18, 2019); Don Lee, *Trump Order Takes Aim at Huawei*, L.A. TIMES (May 16, 2019), (President issued executive order giving administration officials “sweeping powers” to block Chinese telecom giant Huawei from doing business in the United States); Daniel Leisegang, *Listen Up*, THE GERMAN TIMES (Apr. 2019), <http://www.german-times.com/listen-up-huawei-5g-and-the-new-geopolitics/> (“The United States government is currently doing all it can to prevent Huawei’s growing influence. It is demanding that its allies cease awarding contracts to the company.”)

¹⁶⁰ The amendment of CFIUS jurisdiction came in the “Foreign Investment Risk Review Modernization Act of 2018.” See Foreign Investment Risk Review Modernization Act of 2018 § 1719(b).

¹⁶¹ Summary of the Foreign Investment Risk Review Modernization Act of 2018, U.S. Treasury Department, <https://www.treasury.gov/resource-center/international/Documents/Summary-of-FIRRMA.pdf> (CFIUS jurisdiction expanded to any “purchase, lease, or concession by or to a foreign person of real estate located in proximity to sensitive government facilities.”).

¹⁶² *Id.* (CFIUS jurisdiction expanded to investments “in certain U.S. businesses that afford a foreign person access to material nonpublic technical information in the possession of the U.S. business.”).

¹⁶³ *Id.*

enlisted troops, to transfer funds]¹⁶⁴ and ordered divestiture of Grindr [a same-sex dating service].¹⁶⁵

The 2018 legislation also extended the CFIUS review period from 30 days to 45 days—with the possibility of a 15-day extension.¹⁶⁶ For the American business community, this means that being acquired by a Chinese company will be a slower, more tenuous process. All other things being equal, that inevitably makes Chinese investors less attractive.¹⁶⁷ The European Union is also revising its foreign direct investment review process—again, with China in mind.¹⁶⁸ According to Martin Wolf, the EU is following the United States in “getting more hawkish on China’s trade and investment practices.”¹⁶⁹

In all this, western officials and business people are now more likely to think of Chinese companies as representing the Chinese state—better appreciating the blurred lines in China between private and public,

¹⁶⁴ *MoneyGram and Ant Financial Announce Termination of Amended Merger Agreement*, Moneygram (Jan. 2, 2018), <http://ir.moneygram.com/news-releases/news-release-details/moneygram-and-ant-financial-announce-termination-amended-merger> (companies “mutually agreed to terminate their Amended Merger Agreement following the inability of the companies to obtain the required approval for the transaction from the Committee on Foreign Investment in the United States”).

¹⁶⁵ Paul Marquardt, John P. McGill, Jr. & Chinyelu Lee, *CFIUS Forces Kunlun to Unwind 2016 Acquisition of Grindr Over Concerns About the Protection of Sensitive Personal Data*, CLEARY INTERNATIONAL TRADE AND SANCTIONS WATCH (Apr. 4, 2019), <https://www.clearytradewatch.com/2019/04/cfius-forces-kunlun-to-unwind-2016-acquisition-of-grindr-over-concerns-about-the-protection-of-sensitive-personal-data> (“In the case of Grindr, CFIUS may have been specifically concerned about the data of military and intelligence personnel, or other persons with access to information of potential interest to foreign intelligence agencies and potentially vulnerable to blackmail.”).

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., Kate O’Keefe, *Chinese Deals Lose Luster for Officials Across U.S.*, WALL ST. J., July 26, 2019.

¹⁶⁸ The Chinese are certainly aware of how increased scrutiny of investments in western economies is disadvantageous to them. See, e.g., Chen Weihua, *EU’s New FDI Screening Should Not Target China*, CHINA DAILY (Global Edition) (Mar. 8, 2019) (discussing new screening framework for foreign direct investments (FDI) in the EU and noting that “[w]hile the framework does not publicly claim to target Chinese FDI, concern over growing Chinese FDI coming into the EU has been widely viewed as a major reason for the legislation”).

¹⁶⁹ Martin Wolf, Opinion, *The Chinese Economy is Stabilizing*, FIN. TIMES (Apr. 2, 2019). Wolf also believes “[a] return to the relations of a few years ago is unlikely.” *Id.*

including a widespread belief that China has government intelligence officers throughout China's private high technology firms.¹⁷⁰

At the same time that it revised the law governing review of foreign investments, Congress also updated export controls on U.S. technologies with the Export Control Reform Act (ECRA). The ECRA mandates an inter-agency effort to identify "emerging and foundational" technologies "essential" to national security, then add those technologies to our export control system. If "emerging," "foundational" and "essential" were not sufficiently vague concepts, "technology" has a broad meaning in the law, including know-how and research and development results.¹⁷¹ In November 2018, the Commerce Department began a notice and comment period as it works toward development of a revised export control list. Artificial intelligence software and supporting hardware is just one of the central points of debate in shaping new technology export controls.¹⁷²

While this effort is all couched in neutral terms, there is no question that it is meant to "prevent China from getting access to vital new US technologies"¹⁷³ and, as of the summer of 2019, the U.S. Commerce Department had separately cut off technology exports to Chinese

¹⁷⁰ Norman Pearlstine et al., *Who's Behind Huawei?*, L.A. TIMES, April 14, 2019, at A1, A9 ("Interviews with Huawei employees and companies doing business with it reveal a widespread belief that the Chinese government has placed intelligence agents in Huawei officers around the world and that conversations are routinely monitored.").

¹⁷¹ The ECRA defines "technology" to include "(i) information necessary for the development, production, use, operation, installation, maintenance, repair, overhaul or refurbishing of an item; and (ii) information at whatever stage of its creation, such as foundational information and know-how," subject to further specification in regulation. Export Control Reform Act of 2018, H.R.5040, 115th Cong. (2018); see also Martin Chorzempa, *The Trump Administration's Rush to Curb Technology Leakage Is in Danger of Backfiring*, PETERSON INST. OF INT'L ECON: TRADE AND INVESTMENT POLICY WATCH (Jan. 8, 2019), <https://piie.com/blogs/trade-investment-policy-watch/trump-administrations-rush-curb-technology-leakage-danger>.

¹⁷² See, e.g., Letter from the Center for Security and Emerging Technology (CSET) at Georgetown Univ. to Matthew S. Borman, Deputy Assistant Sec'y of Commerce for Export Controls (Jan. 10, 2019), (on file with author), <https://cset.georgetown.edu/wp-content/uploads/2019-01-10-Dept-of-Commerce-GU-CSET-ANPRM-on-Export-Controls-for-AI.pdf> (recommending controls on "equipment for manufacturing AI chips" but against controls on software).

¹⁷³ Chorzempa, *supra* note 171.

supercomputer developers.¹⁷⁴ Because of the way ECRA defines “export,” the law *may* now raise legitimate questions about having Chinese national scientists working in U.S. research and development facilities.¹⁷⁵ While the potential negative impact — on both research and the lives of individuals — is a real concern, revised technology export controls on the American side are a reasonable response to forced technology-transfers on the Chinese side. Companies have a variety of potential responses to demands from a host country for technology transfer,¹⁷⁶ but export controls allow the American businessperson to say “no, I can’t share that technology with you without risking federal prison.” So, we can expect that the American business community will publicly express concern over re-invigorated export controls, while many western companies will quietly use the rules pro-actively. Again, this may just mean less business — because the two (equal) sides cannot agree on the terms of trade.

Are we seeing an overreaction against China? Some in the international business community will feel that way. Given what we know *and do not know*, U.S. and EU efforts to block strategic Chinese investments, rearrange supply chains to avoid compromise, and limit exports of technology might be an inadvertent application of what the Europeans would call the “precautionary principle.” The “precautionary principle” is an idea widely discussed in environmental and health regulation. Originating in German law (“Vorsorgeprinzip”), the basic idea is that *in the case of potentially serious or irreversible effects, there may be a need to act to reduce potential risks before there is strong proof, taking into account the likely costs and benefits of action versus inaction*. The United States has not been an advocate of the precautionary principle in the past, but that approach may become the *de facto* framework on the American side for much of the China-US economic relationship, especially given all the unknowns about what is actually happening in China.

¹⁷⁴ Kate O’Keeffe and Asa Fitch, *U.S. Targets China’s Supercomputing Push with New Export Restrictions*, WALL ST. J., June 21, 2019.

¹⁷⁵ *Id.*

¹⁷⁶ Prud’homme & Zedtwitz, *supra* note 158 (describing several techniques multinational corporations use); Dan Prud’homme, Max von Zedtwitz, Joachim Jan Thraen & Martin Bader, *Forced Technology Transfer Policies: Workings in China and Strategic Implications*, 134 TECHNOLOGICAL FORECASTING & SOC. CHANGE 150 (2018) (analyzing ways China and other countries promote technology transfer and foreign companies resist).

V. CONCLUSION

In his 2016 presidential campaign, Donald Trump made broadside attacks against how the U.S. had handled international trade. As soon as the Trump administration made it clear that Trump's campaign rhetoric would be put into action, we saw both major press outlets and otherwise responsible scholars countering with a defense of free trade that was equally reductionist. As it became clear that Trump was willing—and able—to do revised trade deals (revised KORUS, USMCA), the panic subsided while the distaste for the president's techniques remained.

In the *Wealth of Nations*, Adam Smith arguably gave us a framework for the Trump trade agenda and its 2017-2018 critics. An embodiment of free trade thinking, Smith nonetheless believed that a cost/benefit analysis should be applied to the question of punitive tariffs:

[T]here may be good policy in retaliations . . . when there is a probability that they will procure the repeal of the high duties or prohibitions complained of . . . When there is no probability that any such repeal can be procured, it seems a bad method of compensating the injury done to certain classes of our people, to do another injury to ourselves, not only to those classes, but to almost all other classes of them.¹⁷⁷

Through much of 2017 and 2018 Trump's critics essentially argued that the administration's tariffs and threats of tariffs did more "injury to ourselves" without much prospect of producing "repeal" of activities in other countries that disserve American economic interests.¹⁷⁸ The Trump team disagreed and, if nothing else, got other countries' to the bargaining table. They also got some revised terms of trade, almost always to the benefit of traditional American industry and agriculture.

As the Administration reached revised trade deals and shelved other threatened actions, it became clear that the Trump team's major trade dispute is with China. The Trump team's "diagnosis" about Chinese

¹⁷⁷ ADAM SMITH, *THE WEALTH OF NATIONS* 490 (Edwin Cannan, ed.; London, Methuen, 1961).

¹⁷⁸ Indeed, that was the entire thrust of Paul Krugman's data-free op-ed mentioned above. See Krugman, *supra* note 51.

behavior has been “about the same as previous Administrations.”¹⁷⁹ The difference is that Mr. Trump—not wedded to the narratives of the Bush-Clinton period—carried through on his pledge to get tough. It remains to be seen whether the outcome is a new overall trade deal or an overall unwinding of the entanglement of the Chinese and American economies.

What is clear—and the business community needs to understand—is that Trump’s rhetoric and occasionally cringe-worthy tactics have changed overall attitudes toward China in Washington, in Brussels, and beyond. The accepted narrative now is that something must be done about China’s mercantilist opportunism. In Washington, there is broad support for “a more strategic outlook with respect to competition with China,”¹⁸⁰ indeed “a strategy to cooperate and compete with a China that is decidedly illiberal at home and abroad, even if we wish it were otherwise.”¹⁸¹ Tariffs have been the headline-grabbing tool, but stricter controls on exports to China and much stricter review of Chinese investment into the United States will continue to be part of the mix.

By mid-2019, it also became clear that the Trump team did not intend to blow up the multilateral WTO system as much as allow it to atrophy; the administration focused on bilateral dealings, whether or not WTO-permissible. With the WTO Appellate Body paralyzed by lack of new appointees—a strategy that had actually started under the Obama Administration—WTO enforcement mechanisms are essentially reverting to those of the 1947-1994 GATT. We can expect that the Trump team will be willing to engage the WTO on these terms, celebrating wins before WTO panels and treating unfavorable decisions as effectively advisory opinions. Compliance with WTO rulings has never been 100%—from neither the United States nor the EU. And China has consistently engaged in mechanisms to avoid implementing WTO decisions that seem adverse to core interests. So the irony here is that the Trump administration’s overall attitude to the WTO is now closer to what has been the Chinese attitude for at least a decade.

For the business community, the most important lesson is that we are now past the “end of history” moment when people naively believed that

¹⁷⁹ Carl Schonander, Presentation at the Daniel Morgan Graduate School, *The U.S.-China Economic Relationship: Paradigm Shift or More of the Same?* (April 18, 2018) (on file with the author).

¹⁸⁰ *Id.*

¹⁸¹ Campbell and Ratner Reply in *Did America Get China Wrong? – The Engagement Debate*, FOREIGN AFF. (July/Aug. 2018).

capitalist technocracy had triumphed and companies were free to trot the globe and make money. A new geo-political competition will strongly influence the global business environment for the foreseeable future.

History is back.

